Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARACELI REYES, SYLVIA GARZA,
JOSE DE LEON, AND DOLORES SALINAS,
Petitioners

v.

ROBERTO LUGO,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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29 pp

QUESTION PRESENTED FOR REVIEW

In a 42 U.S.C. § 1983 suit against public officials in their individual capacities, must a plaintiff still satisfy the heightened pleading requirement prior to a filed answer and discovery by (1) pleading with factual specificity and (2) pleading in anticipation of the officials' qualified immunity defense?

PARTIES TO THE PROCEEDING

The petitioners are Araceli Reyes, Sylvia Garza, Jose De Leon, and Dolores Salinas. The respondent is Roberto Lugo.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The names of all parties to the proceedings before the United States Court Of Appeals For The Fifth Circuit are as follows:

(1) Araceli Reyes, who was a Commissioner of the Board of Housing Authority of the City of Donna, Hidalgo County, Texas, and who is a Petitioner (Appellant in the Fifth Circuit).

(2) Sylvia Garza, who was a Commissioner of the Board of Housing Authority of the City of Donna, Hidalgo County, Texas, and who is a Petitioner (Appellant in the Fifth Circuit).

(3) Jose De Leon, who was a Commissioner of the Board of Housing Authority of the City of Donna, Hidalgo County, Texas, and who is a Petitioner (Appellant in the Fifth Circuit).

(4) Dolores Salinas, who was a Commissioner of the Board of Housing Authority of the City of Donna, Hidalgo County, Texas, and who is a Petitioner (Appellant in the Fifth Circuit).

(5) Roberto Lugo, Respondent (Appellee in the Fifth Circuit).

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OPINIONS BY OTHER COURTS IN THIS CASE

The opinions by other Courts in this case have not been published and are not reported in the official and unofficial reports. However, these opinions are listed in the Appendix as set forth below:

(1) The opinion of the United States Court Of Appeals For The Fifth Circuit.[1] See, Roberto Lugo v. The Housing Authority Of The City Of Donna, Hidalgo County, Texas, Et Al, No. 94-60743 (5th Cir. Unpublished Opinion, September 28, 1995) [Appendix A].

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[1]Sometimes hereinafter referred to as "Fifth Circuit."

(2) The Minutes Of Hearing of the United States District Court, Southern District Of Texas, McAllen Division, Hon. Judge Ricardo H. Hinojosa. See, Robert Lugo v. The Housing Authority Of The City Of Donna, Hidalgo County, Texas, Et Al, Civil Action No. M-93-260 (S.D. Tex. October 7, 1994) [Appendix B].

JURISDICTION OF THIS COURT

i. The judgment of the United States Court Of Appeals For The Fifth Circuit was entered on September 28, 1995.

ii. The statutory provision believed to confer on this Court jurisdiction to review the judgment of the United States Court Of Appeals For The Fifth Circuit by writ of certiorari is 28 U.S.C. § 1254(1). This is a petition for writ of certiorari to review a case in the Fifth Circuit after rendition of the Fifth Circuit's judgment. The Fifth Circuit's judgment dismissed an interlocutory appeal of the Petitioners pursuant to 28 U.S.C. § 1291 after the United States District Court For The Southern District Of Texas, McAllen Division, denied their motion to dismiss under Fed.R.Civ.P. 12(b)(6).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions involved in this case are as follows:

> (1) "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected,

any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. § 1983.

(2) "Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Const. amend. I.

(3) "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. XIV, §1.

STATEMENT OF THE CASE

On November 3, 1993, Roberto Lugo[2] filed a lawsuit [Appendix C] in a State District Court of Hidalgo County, Texas, in which he asserted state and federal claims against Petitioners, Araceli Reyes, Sylvia Garza, Jose De Leon, and Dolores Salinas,[3] who at all relevant times were all Commissioners of a governmental entity, the Housing Authority of the City of Donna, Hidalgo County, Texas,[4] which was also included as a named defendant. In the lawsuit, Lugo also sued, on similar grounds, the City of Donna and its City Council officials, Ernest E. Allison, Esmeralda Ramirez, and Adan Hernandez.[5] Lugo claimed that he was wrongfully discharged from his position as Executive Director and Secretary of the Housing Authority, a position that he held from March 23, 1992, until December 2, 1992.

Immediately after the filing of the lawsuit, Petitioners and the other defendants removed the case to the United States

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[2]Hereinafter also referred to as simply "Lugo" or "Respondent."

[3]Hereinafter also referred to as simply "Reyes," "S. Garza," "De Leon," "Salinas," "Housing Authority officials," or "Petitioners."

[4]Hereinafter also referred to as simply "Housing Authority." Although a Defendant, the Housing Authority is not a Petitioner.

[5]Hereinafter also referred to as "the City," "Allison," "Ramirez," and "Hernandez." These Defendants are not Petitioners and are not represented in this case by the undersigned.

District Court, Southern District of Texas, McAllen Division [R.I. 1-36] and each filed a motion to dismiss.[6] Petitioners' motion and brief, filed pursuant to Rule 12(b)(6) and 12(b)(7), Fed.R.Civ.P., specifically pointed out that, with respect to all federal claims asserted in the lawsuit, Lugo failed to comply with the Fifth Circuit's "heightened" standard of pleading by (1) failing to show personal involvement of each of the Petitioners; (2) failing to state a constitutional claim against Petitioners, and (3) failing to state with factual detail and particularity the basis for the federal claims, including why the defendant-officials could not successfully maintain the defense of qualified immunity. [Appendix D and Appendix E].

After the District Court held an initial hearing on the matter, on March 4, 1994, Lugo submitted for filing his response to Petitioners' motion, taking the position that his pleadings had satisfied the heightened pleading requirement and had stated facts to overcome Petitioners' qualified immunity. The record does not indicate that the response was actually filed. [Appendix F]. Accordingly, Lugo filed the same response, attached to a motion for leave to file Plaintiff's response, on April 8, 1994 (R.I. 106-114). Lugo additionally responded to the other Defendants' motion to dismiss and further filed a motion for leave to file first amended petition [sic]. (R.I. 115-135).

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[6]"R" refers to the record of the United States District Court, paginated for the Fifth Circuit appeal. The Roman numeral represents the volume, followed by the page numbers to that record.

On May 6, 1994, the District Court granted Lugo's request to amend his complaint and denied all motions to dismiss without prejudice to refiling, so Defendants could consider the amended complaint (R.I. 137-138). Lugo's First Amended Petition [sic] was filed on May 6, 1994. [Appendix G]. In Section XLI of his amended complaint, Lugo asserted in conclusory fashion that Petitioners, Reyes, Salinas, S. Garza, and De Leon

> "fired Plaintiff in retaliation for Plaintiff's non-support of the U.C.D. faction, i.e., patronage dismissal, that is for failing to support the prevailing political group."

Lugo asserted that "U.C.D." referred to "United Citizens For Donna," claimed to be one of several political groups existing in Donna, Texas. Further, Lugo provided in Sections XXV and XXIX, his personal beliefs that Petitioners were "U.C.D. allies," that "they would effect U.C.D.'s wishes," and that Reyes was "U.C.D. allied" and

> "wanted to effect Plaintiff's ouster as Executive Director and Secretary of the Donna Housing Authority." [Appendix G].

In Sections VI and VII of his amended complaint, Lugo states that he spoke to the City officials -- Ramirez, Hernandez, and Allison -- and particularly believes that City Manager Allison admitted that U.C.D. wanted him removed. Similarly, Lugo alleged that he spoke to a former commissioner of the Housing Authority, Adalberto Garza, who he believes told him essentially the same. [Appendix G].

Lugo ends his First Amendment allegations with two boilerplate statements in Sections XLII and XLVI of his amended complaint:

> "The action by these Defendants in firing Plaintiff as intended to deny and did deny Plaintiff his right to freedom of political belief and association which is protected by the First and Fourteenth Amendments to the United States Constitution and made actionable by 42 U.S.C. § 1983."
>
> ". . . Plaintiff believes that his employment with the Donna Housing Authority and thus, the City of Donna, was wrongfully severed because of Plaintiff's non-alliance with U.C.D. As a citizen of the State of Texas and of the United States, Plaintiff enjoys the right to freely associate himself with any or no political organization. Plaintiff believes that his termination for non-alliance violates the public policy of the State of Texas and such conduct on the part of the Donna Housing Authority and the City of Donna is actionable as wrongful discharge."

Regarding a denial of procedural due process claim under the Fourteenth Amendment, Lugo asserts in Section XXXVII that Petitioners, as a group,

> "refused to set a standard by which he was to be judged, despite the fact that an official standard was available."

He contends further,

> "he was not given an effective opportunity to rebut the allegations of ineffective management levied against him before his termination became procedurally effective."

Lugo concedes in his amended complaint that he was advised by Donna Housing Authority Board members of their intent to fire him, was provided in advance with notice of the hearing, was provided in advance with a list of the charges against him that would be discussed at the hearing, and admits that his termination was in fact the subject of a hearing held by the Donna Housing Authority Board of Commissioners at which he was present. [Appendix G].

Lugo's sole belief that a denial of liberty claim under the Fourteenth Amendment exists is his allegation that Reyes concluded Lugo's termination hearing with the statement that Lugo was fired "for ineffective management of the Donna Housing Authority complexes." [Appendix G].

Petitioners again moved to dismiss, with supporting brief, asserting the same contentions of Lugo's failure to comply with the heightened pleading requirement. [Appendix H and Appendix I].[7] Lugo again asserted that his pleadings were factually specific and sufficient. [Appendix J]. Subsequently, the Honorable Ricardo H. Hinojosa, District Judge, United States District Court For The Southern District Of Texas, after a hearing held on October 7, 1994, denied Petitioners' and other Defendants' motions to dismiss, without prejudice to refiling as a motion for summary judg-

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[7]The City Defendants also moved to dismiss for failure to state a claim.

ment. This oral ruling was subsequently reflected in a minute entry of October 7, 1994 [Appendix B], which was entered on the District Court's docket on October 21, 1994. [Appendix K].

Petitioners filed their Notice Of Donna Housing Authority Defendants Of Pre-Trial Interlocutory Appeal To The United States Court Of Appeals, Fifth Circuit From The Order (Announced October 7, 1994, And Entered On The Docket October 21, 1994) Of The United States District Court For The Southern District Of Texas (McAllen) Denying Their Motion To Dismiss on October 28, 1994. [Appendix L]. As Judge Hinojosa had denied a Rule 12(b)(6) motion to dismiss that had asserted the qualified immunity defense of public officers and because Petitioners had filed their notice of appeal within thirty days, as required by F.R.A.P. 4(a), the Fifth Circuit had jurisdiction of Petitioners' appeal under 28 U.S.C. § 1291.

Petitioners' brief before the Fifth Circuit raised the issue of whether the United States District Judge erred, as a matter of law, in denying Petitioners' motion to dismiss, even though Lugo had made only conclusory allegations of constitutional violations and had failed to overcome Petitioners' qualified immunity defense. Petitioners asserted that the standard applicable to the motion to dismiss was the heightened pleading requirement adopted by Elliott v. Perez, 751 F.2d 472 (5th Cir. 1985).

The Fifth Circuit issued its opinion on September 28, 1995, dismissing Petitioners' appeal on the basis that the recent decision of Schultea v. Wood, 47 F.3d 1427 (5th Cir. 1995)(en banc), had abolished that part of the heightened pleading standard which

mandated that plaintiffs anticipate a qualified immunity defense in their complaint before discovery. [Appendix A]. Petitioners now appeal to this Court from the Fifth Circuit's September 28, 1995, opinion dismissing their appeal of the District Court's denial of their Rule 12(b)(6) motion.

ARGUMENT

The Fifth Circuit in this case, based on its recent en banc decision of Schultea v. Wood, 47 F.3d 1427 (5th Cir. 1995)(en banc), held that plaintiffs in § 1983 cases against public officials "need no longer anticipate a qualified immunity defense in the complaint," that defendant officials must raise the qualified immunity defense in their answer, which then triggers a discretionary decision by the District Court whether to order a reply, and that the case can proceed with the District Court considering any motions for summary judgment. [Appendix A]. This decision in effect abolishes the heightened pleading standard long recognized in federal civil rights cases and is the only decision of its type in the nation.

The Fifth Circuit's decision is in direct conflict with every federal circuit court that has addressed the heightened pleading standard. Specifically, nine circuit courts have adopted the heightened pleading standard. See, e.g., Hunter v. District Of Columbia, 943 F.2d 69, 76 (D.C. Cir. 1991); Oladeinde v. City Of Birmingham, 963 F.2d 1481, 1485 (11th Cir. 1992), cert. denied, 113 S.Ct. 1586 (1993); Sawyer v. County Of Creek, 908 F.2d 663, 667 (10th Cir. 1990); Branch v. Tunnell, 937 F.2d 1382, 1386-87 (9th Cir. 1991); Brown v. Frey, 889 F.2d 159, 170 (8th Cir. 1989),

cert. denied, 493 U.S. 1088 (1990); Elliott v. Thomas, 937 F.2d 338, 344-45 (7th Cir. 1991), cert. denied, 502 U.S. 1074 (1992); Chapman v. City Of Detroit, 808 F.2d 459, 465 (6th Cir. 1986); Dunbar Corp. v. Lindsey, 905 F.2d 754, 763 (4th Cir. 1990); Krohn v. United States, 742 F.2d 24, 31-32 (1st Cir. 1984).[8]

Although many of the important goals of the heightened pleading standard in § 1983 cases have expressly been adopted as pleading requirements by this Court in prior opinions for several years, this Court has never expressly ruled on the issue of whether the heightened pleading requirement, as expressed by prior Fifth Circuit law, is applicable to § 1983 cases involving public officials who raise the qualified immunity defense. As stated recently by this Court, "we thus have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." Leatherman v. Tarrant County Narcotics Intelligence & Coordination, 113 S.Ct. 1160 (1993). The present case now presents the occasion for a determination of the important federal question of whether plaintiffs in all federal courts will be required in federal civil rights cases against public officials in their individual capacities, to state their claim in accordance with the heightened pleading standard. Because the Fifth Circuit's ruling in this case departs from well-established law among the Circuits and from pleading requirements set forth by

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[8]These cases were previously cited in support of this same conclusion by Justice Edith H. Jones of the Fifth Circuit in her concurring opinion in Schultea, 47 F.3d at 1434 f.n. 1.

this Court in prior opinions, the issue should be settled by this Court in this case.

Through this petition for writ of certiorari, Petitioners seek clarification that the heightened pleading requirement applies in all federal courts, so that plaintiffs in § 1983 cases against officials in their individual capacities, will be required to (1) state with factual detail and particularity the basis for their claim, (2) state facts showing why the defendant-official cannot successfully maintain the defense of immunity, and (3) overcome the defendant official's qualified immunity by specific facts prior to an answer by the official and prior to any discovery in the case.

A. Legal Basis For Granting The Petition

For almost two decades, this Court has recognized that in § 1983 civil rights cases against public officials in their individual capacities, plaintiffs are required to plead with factual specificity or have their case dismissed prior to discovery. In Butz v. Economou, 438 U.S. 478, 506 (1978), the Court emphasized that such a requirement was vital to advance a major goal:

> "We consider here, as we did in Scheuer, the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."

This Court noted that pleadings against public officials in § 1983 cases, if consisting of nothing more than conclusions, would be dismissed at the outset without resort to any type of discovery:

> "Insubstantial lawsuits can be quickly terminated by the federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss."

Butz, 438 U.S. at 507.

With the groundwork laid in Butz, this Court's decision in Harlow v. Fitzgerald, 457 U.S. 800 (1982), dispelled all notions that notice pleadings under Fed.R.Civ.P. 8 would suffice in § 1983 claims of this type. Harlow accords to public officials qualified immunity if sued for actions taken in the performance of their official duties and as long as their conduct is not in violation of

> "clearly established statutory or constitutional rights of which a reasonable person would have known."

457 U.S. at 818. To protect against the abuses of subjecting public officials to frivolous lawsuits, Harlow, quoting Butz, specifically affirms that pleadings in these types of cases must be fact specific or plaintiff's complaint will be dismissed on the pleadings without resort to discovery. As stated by this Court,

> "bare allegations of malice should not suffice to subject government officials either to the costs of trial or the burdens of broad-reaching discovery."

457 U.S. at 817. More importantly, this Court in Harlow further provided that qualified immunity is to be determined as a

threshold matter before allowing any discovery. 457 U.S. at 818.

Harlow's principles of qualified immunity were correctly interpreted by the Fifth Circuit, in Elliott v. Perez, supra, as imposing a heightened pleading requirement on plaintiffs who asserted § 1983 claims against public officials. Under Elliott, plaintiffs were required to state in their complaint their claim "with factual detail and particularity" and to assert facts showing "why the defendant-official cannot successfully maintain the defense of immunity." Id. at 1473. In reference to Elliott's heightened pleading standard, this Court recently stated that it is "a more demanding rule for pleading a complaint under § 1983 than for pleading other kinds of claims for relief." Leatherman, 122 L.Ed.2d at 523.

The practical effect of the heightened pleading standard is that conclusory and speculative pleadings are disallowed. Such a complaint will be dismissed as soon as it is evident from the pleadings that plaintiff has stated his best case prior to discovery. Consistent with Harlow, the Fifth Circuit, in Jacquez v. Procunier, 801 F.2d 789, 792 (5th Cir. 1986), stressed the importance of determining qualified immunity as a threshold matter:

> "If the protections afforded to public officials are not to ring hollow, plaintiffs cannot be allowed to continue to amend or supplement their pleading until they stumble upon a formula that carries them over the threshold."

In the present case, the Fifth Circuit, based on its recent en banc decision, abro-

gates all procedural safeguards of qualified immunity that have been established for public officials in § 1983 cases both by its prior opinions and by this Court in Butz, Harlow, and Mitchell. First, the Fifth Circuit's holding that plaintiffs need no longer anticipate a qualified immunity defense in their complaint [Appendix A] contravenes Butz's and Harlow's insistence that insubstantial lawsuits, based on "artful pleading," be "quickly terminated." Harlow, 457 U.S. at 814; Butz, 438 U.S. at 507-508. For qualified immunity to provide assurances against frivolous § 1983 lawsuits aimed at public officials, plaintiffs in such cases should still be required to anticipate the defense in their complaint. Since qualified immunity has been in federal jurisprudence for well over two decades, it should be no mystery to plaintiffs that a defendant-public official will demand specific pleadings that overcome the defense. Moreover, leaving the plaintiff with the option to state his or her specific facts after defendant's responsive pleading simply would invite protracted litigation, which would frustrate the very aim of Harlow to resolve the qualified immunity issue at the earliest possible stage of the case.

Second, the Fifth Circuit's rulings that the defendant-official must raise the qualified immunity defense in the answer and that the District Court may, in its discretion, order a reply tailored specifically to the issue of qualified immunity violate the same principles of Harlow and Butz that require analysis of the qualified immunity issue on the initial pleading by the plaintiff. In addition to the fact that all other circuit courts which have addressed the issue require factually-specific pleadings by the plaintiff to overcome defendant's qualified immunity, this Court

also has not shown disfavor with the heightened pleading standard. To the contrary, Justice Kennedy, concurring in Siegert v. Gilley, 500 U.S. 226, 236 (1991), supports the heightened pleading standard:

> "The heightened pleading standard is a necessary and appropriate accommodation . . . avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls . . . upon the assertion of a qualified immunity defense the plaintiff must put forth specific, nonconclusory factual allegations which establish malice, or face dismissal."

Third, the Fifth Circuit's holding that the District Court can proceed with discovery, without requiring adherence to the heightened pleading standard, and can consider summary judgment motions, is in direct violation of the holding of Harlow, that "until this threshold immunity question is resolved, discovery should not be allowed." Moreover, if District Courts are now allowed to wait until after substantial discovery and at the summary judgment stage to consider the qualified immunity defense, qualified immunity is essentially unavailable to defendant-officials during a substantial part of the litigation. Not only does such a ruling frustrate all established goals of qualified immunity in the several years that this Court has considered it, but also the ruling destroys the fundamental principle of qualified immunity in these types of cases which provides that public officials are not just merely immune from liability but immune

from suit altogether. Mitchell v. Forsyth, 472 U.S. 511, 526.

In sum, abolishment of the heightened pleading requirement, in violation of the holdings of Harlow, directly removes the reasonable expectation that public officials had, of securing the dismissal of frivolous lawsuits either immediately upon the filing of the suit or very early in litigation when it was clear that the plaintiff had stated his or her best case. More importantly, the Fifth Circuit's decision in this case, affirming the new procedural rules of Schultea, in effect creates confusion as to when a District Court would have the duty to dismiss frivolous federal claims based on qualified immunity. By making it discretionary for the District Court to order a reply and further making it discretionary for the District Court to dismiss it at that stage, the Fifth Circuit has created a situation where defendant-officials clearly will not be in a position to require the District Court to dismiss non-meritorious lawsuits prior to trial. As Justice Emilio M. Garza of the Fifth Circuit stated in his concurring opinion in Schultea,

> "Because the standards that once governed a plaintiff's allegations regarding qualified immunity will not apply to a plaintiff's reply, the majority must decide what rules, if any, govern the content of such a reply. The Court does not answer this question with an independent legal requirement against which District Courts can measure a plaintiff's allegations. . . . the majority's Rule 7 approach, however novel and interesting, raises more questions than it answers."

47 F.3d at 1437-1438.

The present case is precisely the type of "artful pleading" that Harlow required to be "quickly terminated." Unquestionably, Plaintiff's First Amended Petition [sic] [Appendix G] contains averments against Petitioners[9] regarding three federal claims that would not satisfy the heightened pleading standard. Respondent asserts a First Amendment claim that he was discharged in retaliation for his non-association with a group in Donna, Texas, called United Citizens for Donna (U.C.D.). The elements of Respondent's cause of action included the requirement that he plead facts to show (1) that he was discharged in retaliation for his political association, and (2) the protected activity was a substantial motivating factor of his discharge. Coughlin v. Lee, 946 F.2d 1152 (5th Cir. 1991). Respondent's amended complaint is completely bereft of any factual allegations showing that he participated in any type of political association. Respondent submits conclusory and speculative allegations that he must have been fired from his job for non-support of U.C.D. He does not allege any type of statements or conduct of Petitioners which would reflect impermissible retaliation. Respondent submits only his personal belief that Petitioners were "U.C.D. allies" and "they would affect U.C.D.'s wishes". Had the protections afforded public officials under Harlow and Elliott still been in effect at the time of the appeal in this case, clearly the denial

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[9]There is no dispute that Petitioners, at all relevant times Commissioners of the Donna Housing Authority, a public entity, were entitled to assert the qualified immunity in their Rule 12(b)(6) motion.

of Petitioners' motion to dismiss would have been reversed and all claims of First Amendment violations would have been dismissed.

Similarly, Respondent alleges in conclusory fashion that he was denied procedural due process because allegedly Petitioners "refused to set a standard by which he was to be judged." Yet, due process is met when, as here, the employee is provided notice and opportunity to respond in a hearing that employs informal procedures. Soderstrum v. Town of Grand Isle, 925 F.2d 135 (5th Cir. 1991). Respondent, in his complaint, recognizes that he was provided advance notice of hearing, a list of charges, and an opportunity to respond at a hearing before being fired. His personal opinion that he was denied due process fails to overcome each of the Petitioner's qualified immunity and, but for the Fifth Circuit's dismissal of the appeal based on Schultea, all due process claims would have been dismissed.

Respondent's third federal claim is that at the conclusion of the hearing when he was discharged from employment, the chairperson, Petitioner Reyes, allegedly indicated that the Donna Housing Authority Board's decision was that he was fired for "ineffective management of the Donna Housing Authority complexes." The alleged statement is in the nature of an opinion or assessment rather than a "false assertion of wrongdoing," as required by Fifth Circuit law to sustain a denial of liberty interest claim under the Fourteenth Amendment. San Jacinto Savings & Loan v. Kacal, 928 F.2d 697, 701 (5th Cir. 1991). Clearly, but for the new procedural rules affirmed in this case, these claims would have also been dismissed on the basis that they failed to overcome each Petitioner's qualified immunity.

Petitioners respectfully submit that if the Fifth Circuit's decision in this case is allowed to stand, Petitioners unjustly will be required to defend federal claims when qualified immunity principles under Harlow would have appropriately required dismissal. Petitioners seek the right to enjoy the rulings of Harlow, as available to all other circuits. The Fifth Circuit's new procedural rules for qualified immunity in this case should be reversed.

B. Practical Reasons For Granting The Petition

The practical reasons for granting this petition are firmly established by Harlow itself and the circumstances still necessitate these same safeguards that were provided. Harlow expressly recognized that qualified immunity was necessary in § 1983 cases against public officials to contain certain "social costs," such as expenses of litigation." 474 U.S. at 814. If allowed to stand, the Fifth Circuit's decision in this case undoubtedly will substantially increase litigation expenses. No longer is a public official guaranteed that he or she can minimize costs when sued under § 1983 by obtaining dismissal of frivolous claims as a threshold matter. The decision in effect extinguishes the right of qualified immunity before the summary judgment stage, which typically is at the end of discovery. Since District Courts have the discretion to order a reply and proceed with discovery, Harlow's insistence of a determination of the qualified immunity at the earliest stage and before discovery is thwarted. Moreover, since a District Court generally has the discretion to reserve ruling on a motion for summary judgment until time of trial, conceivably qualified immunity could be effectively lost altogether by the District Court

simply ruling on that issue at time of trial. It is well established that qualified immunity is lost if the case is allowed to go to trial.

Second, allowing frivolous suits to proceed through discovery will "divert official energy from oppressing public issues," another goal of Harlow. 474 U.S. at 814. With the propensity in this nation for litigation of frivolous claims and with the overcrowded dockets of federal courts, the distraction from official duties and resulting slowdown in the important work of government resulting from long pending and over-litigated lawsuits is more realistic and probable today than it was in Harlow.

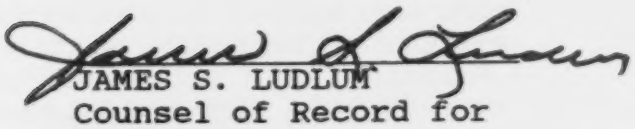
Third, the new decision of the Fifth Circuit will deter able citizens from accepting public office, another goal of Harlow. 474 U.S. at 814. Skilled public officials, without protections afforded by qualified immunity, will find employment in the private sector more advantageous.

Finally, if the qualified immunity protections of Harlow are not afforded to public officials, litigation defense costs and expenses will be escalated and a waste of judicial economy will result. Needless discovery, preparation for trial and trial will occur in cases to achieve the same result of dismissal as would have occurred at the Rule 12(b)(6) stage with the heightened pleading standard. Moreover, to have the Fifth Circuit and the rest of the circuits in this nation split on the important purposes of Harlow will invite confusion in the decisions of the courts and uncertainty as to the exact standards that will apply to plaintiffs' § 1983 complaints, and this is the very type of situation that warrants review by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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Supreme Court, U.S.
FILED
95 1041 DEC 27 1995
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARACELI REYES, SYLVIA GARZA,
JOSE DE LEON, AND DOLORES SALINAS,
Petitioners

v.

ROBERTO LUGO,
Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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13915 Burnet Road
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194 pp

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Petitioners

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APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60743
Summary Calendar

ROBERTO LUGO,

Plaintiff-Appellee

versus

THE HOUSING AUTHORITY OF THE CITY OF DONNA, HIDALGO COUNTY, TEXAS, ET AL.,

Defendants

ARACELIA REYES, Individually, Etc., ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas
(M-93-CV-260)

Before REAVLEY, SMITH and PARKER, Circuit Judges.

PER CURIAM:[1]

Plaintiff Roberto Lugo brought various state claims and three claims under 42 U.S.C. § 1983 against the commissioners of the Donna Housing Authority. The commissioner moved under Fed. R. Civ. P. 12(b) (6) to dismiss the §1983 claims on qualified immunity grounds, arguing that Lugo's complaint did not meet the heightened pleading standards applicable to § 1983 actions under *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985). The commissioners now appeal the denial of their 12(b)(6) motion.

Between the time the district court denied the motion to dismiss and the consideration of this appeal, the Fifth Circuit changed the pleading procedure for cases in which qualified immunity is asserted as a defense. *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995) (en banc). Under *Schultea*, plaintiffs need no longer anticipate a qualified immunity defense in the complaint. *Id.* at 1430. If the complaint states a claim under normal pleading standards, the defendant must raise his qualified immunity in an answer, and if he does so, the district court may, in its discretion, insist that plaintiff file a reply tailored specifically to the issue of qualified immunity. *Id.* at 1433-34. After receiving the reply, the court can determine whether the case can proceed and consider any motions for summary judgment. *Id.* In light of *Schultea*, and

---

[1]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court had determined that this opinion should not be published.

because denial of a motion to dismiss is not appealable, this appeal is dismissed.

DISMISSED.

U.S. COURT OF APPEALS
FILED SEP 28 1995
CHARLES R. FULBRUGE III CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARACELI REYES, SYLVIA GARZA,
JOSE DE LEON, AND DOLORES SALINAS,
Petitioners

v.

ROBERTO LUGO,
Respondent

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX B

HONORABLE RICARDO H. HINOJOSA, JUDGE PRESIDING

COURTROOM CLERK: Sylvia Martinez
ELECTRONIC RECORDING OPERATOR: Irma Soto
LAW CLERK: John Baker/Tracy Klingler
Interpreter: _____

CONVENE ADJOURN DATE: October 7, 1994

CIVIL ACTION NO. M-93-260

ROBERTO LUGO COUNSEL: ROLANDO GARCIA

v.

THE HOUSING AUTHORITY OF THE CITY OF DONNA, COUNSEL: ANTHONY G. BROCATO

CITY OF DONNA COUNSEL: LISA MOUNT

MINUTES OF HEARING

Case is called on the docket for hearing on Defendants' Motions to Dismiss. Arguments of counsel. Court makes findings. Court DENIES Motions to Dismiss without prejudice to refiling as a motion for summary judgment. Court will issue a docket control order. (4 mos)

United States District Court
Southern District of Texas
FILED OCT 7 1994
Michael N. Milby, Clerk

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARACELI REYES, SYLVIA GARZA,
JOSE DE LEON, AND DOLORES SALINAS,
Petitioners

v.

ROBERTO LUGO,
Respondent

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX C

CAUSE NO. C-4806-93-D

ROBERTO LUGO	§	IN THE 206TH
	§	
vs.	§	
	§	
HOUSING AUTHORITY OF THE CITY OF DONNA, HIDALGO COUNTY, TEXAS; ARACELI REYES, SYLVIA GARZA, JOSE DE LEON, AND DOLORES SALINAS, ALL INDIVIDUALLY AND IN THEIR CAPACITY AS COMMISSIONERS OF THE BOARD OF THE HOUSING AUTHORITY OF THE CITY OF DONNA, HIDALGO COUNTY, TEXAS; ERNEST E. ALLISON, INDIVIDUALLY AND IN HIS CAPACITY AS INTERIM CITY MANAGER OF THE CITY OF DONNA, HIDALGO COUNTY, TEXAS; ESMERALDA RAMIREZ AND ADAN HERNANDEZ, INDIVIDUALLY AND IN THEIR CAPACITY AS COUNCIL MEMBERS OF THE CITY OF DONNA, HIDALGO COUNTY, TEXAS	§	FILED AT___ O'CLOCK __M NOV 3 1993 PAULINE G. GONZALEZ CLERK, District Courts, Hidalgo County By_____ Deputy
	§	DISTRICT COURT OF
	§	HIDALGO COUNTY, TEXAS

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now, ROBERTO LUGO, Plaintiff, complaining of the HOUSING AUTHORITY OF THE CITY OF DONNA, HIDALGO COUNTY, TEXAS; ARACELI REYES, SYLVIA GARZA, JOSE DE LEON, and DOLORES SALINAS, all individually and in their capacity as Commissioners of the Board of the Housing Authority of the City of Donna, Hidalgo County, Texas; and Ernest E. Allison, individually and in his capacity as

Interim City Manager of the City of Donna, Hidalgo County, Texas; ESMERALDA RAMIREZ, and ADAN HERNANDEZ, individually and in their capacity as Council Members of the City of Donna, Hidalgo County, Texas, Defendants, and for cause of action would respectfully show the Court as follows:

I.

Plaintiff, ROBERTO LUGO, is an individual residing in Donna, Hidalgo County, Texas.

Defendant HOUSING AUTHORITY OF THE CITY OF DONNA, HIDALGO COUNTY, TEXAS, is an entity of the City of Donna formed and authorized to provide housing for residents with low income in the Donna, Hidalgo County, Texas area. It has its offices at 705 Silver Avenue, Donna, Hidalgo County, Texas, and it can be served with citation by certified mail, return receipt requested, by serving Araceli Reyes, Chairman, at P. O. Box 667, Donna, Texas 78537.

Defendant, ARACELI REYES, is an individual who serves, or has served, as a Commissioner on the Board of the Housing Authority of the City of Donna, Hidalgo County, Texas. She can be served with process individually and in her capacity as a Commissioner on the Board at 513 West Frontage #7, Donna, Texas 78537.

Defendant, SYLVIA GARZA, is an individual who serves, or has served, as a Commissioner on the Board of the Housing Authority of the City of Donna, Hidalgo County, Texas. She can be served with process individually and in her capacity as a Commissioner on the Board at 210 S. 17th St., Donna, Texas 78537.

Defendant JOSE DE LEON, is an individual who serves, or has served, as a Commis-

sioner on the Board of the Housing Authority of the City of Donna, Hidalgo County, Texas. He can be served with process individually and in his capacity as a Commissioner on the Board at 308 Casiano St., Donna, Texas 78537.

Defendant, DOLORES SALINAS, is an individual who serves, or has served, as a Commissioner on the Board of the Housing Authority of the City of Donna, Hidalgo County, Texas. She can be served with process individually and in her capacity as a Commissioner on the Board at Rt. 5, Box 605, Donna, Texas 78537.

Defendant, ERNEST E. ALLISON, is an individual who has been Interim City Manager of the City of Donna, Hidalgo County, Texas. He can be served with process individually and in his capacity as Interim City Manager of the City of Donna, Hidalgo County, Texas at North Valley View Road, Donna, Texas 78537.

Defendant, ESMERALDA RAMIREZ, is an individual who is or has been Council Member of the City of Donna, Hidalgo County, Texas. She can be served with process individually and in her capacity as Council Member of the City of Donna, Hidalgo County, Texas at 314 N. 7th St., Donna, Texas 78537.

Defendant, ADAN HERNANDEZ, is an individual who is or has been Council Member of the City of Donna, Hidalgo County, Texas. He can be served with process individually and in his capacity as Council Member of the City of Donna, Hidalgo County, Texas at 210 N. 8th St., Donna, Texas 78537.

II.

Whenever is alleged in this petition that the Housing Authority of the City of Donna, Hidalgo County, Texas did any act or

thing, it is intended to mean that its Board of Commissioners did such act or thing and that at the time such act or thing was done, it was done with full authority and/or was done in the normal or routine course and scope of serving as a Commissioner of the Housing Authority of the City of Donna, Hidalgo County, Texas, hereinafter Donna Housing Authority.

III.

Venue of this action is proper in this county because the cause of action accrued in whole or in part in the county of suit, Hidalgo County, Texas.

IV.

On or about March 23, 1992, Plaintiff entered into employment with the Donna Housing Authority for the position of Executive Director and Secretary. The duties of Plaintiff in this regard included administering public housing projects of approximately 130 units, administering Section 8 housing with approximately 230 landlords and tenants, communicating with representatives of the Department of Housing and Urban Development, and generally overseeing the building and/or remodeling of housing unit.

V.

At the time of appointment, the Board of Commissioners of the Donna Housing Authority was comprised of Jose Yañez, Jesus Padilla, Rudy Cardenas, Cecilio Sauceda, and Adalberto Garza. The Board of Commissioners of the Donna Housing Authority had been appointed by then Donna Mayor Hector Casiano and not by the City Manager.

VI.

On or about March 25, 1993, Defendant, Ernest E. Allison, along with Defendant City Council Members Esmeralda Ramirez and Adan Hernandez approached Donna Housing Authority Commissioner Adalberto Garza to Complain about Plaintiff and asked him to terminate Plaintiff.

VII.

On or about April 25, 1993, Plaintiff had occasion to speak to Defendant City Council members Esmeralda Ramirez and Adan Hernandez about Plaintiff's job where both individuals admitted that UCD wanted Plaintiff removed from his position as Executive Director and Secretary. (UCD refers to the United Citizens for Donna, one of several political groups existing in the City of Donna, and to which Defendants Esmeralda Ramirez and Adan Hernandez are or were publicly allied with.) Plaintiff, on this same day, approached Defendant Ernest E. Allison and Board member Adalberto Garza who confirmed that UCD was indeed interested in effecting Plaintiff's ouster as Executive Director and Secretary because "Casiano's Board had hired him", i.e. a non-UCD Board of Commissioners of the Donna Housing Authority.

VIII.

On or about June 5, 1992, Plaintiff met with two UCD members who stated that his job had been discussed at a UCD meeting. At this meeting or meetings, these two (UCD) members reiterated what was becoming apparent to Plaintiff, namely that UCD wanted him out (as Executive Director and Secretary).

IX.

On or about October 5, 1992, Board member Jorge Cacares visited Plaintiff at his office and stated to him that Defendant Araceli Reyes, who is or was also allied with UCD, had told him that she wants Plaintiff "to resign or be fired".

X.

On or about October 15, 1992, Plaintiff received a letter from Defendant Ernest E. Allison, informing him that he had appointed three new Donna Housing Authority Commissioners, Defendants Sylvia Garza, Dolores Salinas, and Jose Deleon.

XI.

On or about October 19, 1992, Defendant Araceli Reyes went to Plaintiff's office and asked that he add to the agenda an item which was a discussion to terminate Plaintiff. Plaintiff then contacted Defendant Ernest E. Allison to discuss this with him. He stated that he had appointed the three new (and UCD allied) Commissioners upon the urging of Defendants Esmeralda Ramirez and Adan Hernandez who sought "control" over the Donna Housing Authority and who had promised him (Defendant Ernest E. Allison) that his tenure as Interim City Manager would be extended if he did so.

XII.

On or about November 9, 1992, Defendant Araceli Reyes wrote Plaintiff to acknowledge his request for a hearing and submitted to him the list of charges that would be used at the hearing, which list included "ineffective management of the Donna Housing Authority complexes".

XV.

At the December 2, 1992, hearing and while in executive session, Plaintiff attempted to have the term "management" defined so as to set the standard by which he was to be judged. Plaintiff offered the definition as set forth by the Texas Housing Association and was prepared to rebut the Donna Housing Authority's charges based on this standard. The Donna Housing Authority, however, refused to get a standard and proceeded to terminate Plaintiff from his position as Executive Director and Secretary of the Donna Housing Authority.

XVI.

At the conclusion of the meeting, the Donna Housing Authority Board, by and through its Chairman, Defendant Araceli Reyes, in a prepared statement stated that Plaintiff was terminated for "ineffective management of the Donna Housing Authority complexes".

XVII.

Since his appointment, Plaintiff has been dedicated, loyal, and sincere about his work at the Donna Housing Authority, Plaintiff obtained the appropriate certification as required by the Department of Housing and Urban Development immediately after beginning his tenure. Plaintiff never received any negative comments from the Board of the Donna Housing Authority with respect to his job performance. In fact, Plaintiff feels strongly that he was duly performing his duties as Executive Director and Secretary. Not until the Board of the Donna Housing Authority provided him with a list of charges after noting on its intent to terminate him did Plaintiff have an inkling that his job performance was poor. Ultimately, Plaintiff was terminated for reasons after

he had substantively and effectively been wrongfully terminated.

FIRST CAUSE OF ACTION

XVIII.

On or about December 3, 1992, Defendant Donna Housing Authority, by and through its Chairman, Defendant Araceli Reyes, well knowing the premises, and intending to injure Plaintiff and to deprive him of his good name, fame, credit business, and reputation, did maliciously and unlawfully make and publish of and concerning the Plaintiff, false, scandalous, unlawful, defamatory, and malicious statements and libel attached as Exhibit A and incorporated by reference as if fully set out herein.

XIX.

The statements contained in the two newspaper articles in Exhibit A against Plaintiff are false. Such statements are libelous and injurious to Plaintiff as a person not worthy of trust and incompetent in performing his job responsibilities.

XX.

Defendants Donna Housing Authority, Araceli Reyes, Sylvia Garza, Dolores Salinas, and Jose Deleon well knew the aforementioned statements were untrue when they were made, and these Defendants had actual notice of the resulting foreseeable damages to Plaintiff of their claim, especially considering the fact that these Defendants refused to set a standard against which Plaintiff was to be judged when one was available and brought to the attention of these Defendants by Plaintiff.

XXI.

Despite this, these Defendants did maliciously and wantonly intend to injure Plaintiff simultaneous with their distributing for publication in the newspapers and radio and televisions stations the statement that Plaintiff was terminated for ineffective management; and that accounts of these Defendants' libelous statements were published in said newspapers. Accounts published in the newspapers and attached hereto and incorporated by reference as if fully set out herein as Exhibit A.

XXII.

By reason of said publication and widespread circulation of the said false, scandalous, malicious, defamatory and libelous reason for Plaintiff's termination, Plaintiff has been subjected to scandal, scorn, contempt and distrust among his neighbors, colleagues, business acquaintances, and other community members, and has thus suffered injury to his reputation, feelings, peace of mind, and general sense of well-being.

XXIII.

As a direct and proximate result of these Defendants effecting publication of the false statement hereinabove complained of, Plaintiff lost a substantial means of his livelihood, and by Defendants' action, lost this means of support for himself and family, and the ability to be engaged in employment requiring similar skills, training, and experience.

SECOND CAUSE OF ACTION

XXIV.

In the subject employment relationship, Plaintiff was an employee of the Donna Housing Authority, his employer. Plaintiff thus was in a contractual relationship with the Donna Housing Authority. The Donna Housing Authority is a body generally charged with establishing programs of low-income housing for low-income families of the community. Its policies and procedures are set by a 5-member Board of Commissioners who are, in the City of Donna, appointed by the City Manager. These commissioners serve as the governing officers of the Donna Housing Authority. Their role is similar to that of the members of the board of directors of a private corporation. Among its principal responsibilities are hiring, and thus ultimately controlling the employment fate, of the Executive Director, whose charge it is to manage the day-to-day operations of the housing authority.

XXV.

Plaintiff was appointed to the position of Executive Director by such a Board on or about March 23, 1992, and was discharging his obligations pursuant to his contractual relationship with the Donna Housing Authority until his termination. Defendants Esmeralda Ramirez, Adan Hernandez, and Ernest E. Allison knew that Plaintiff was in a contractual relationship with the Donna Housing Authority because of their respective official capacities of the City of Donna. Despite this knowledge, Defendants Esmeralda Ramirez, Adan Hernandez, and Ernest E. Allison actively, knowingly, intentionally, and maliciously nonetheless effected Plaintiff's termination from his employment as Executive Director and Secretary of the Donna Housing Authority by

persuading it, through its governing body, the Board of Commissioners, to so do. Defendants Esmeralda Ramirez and Adan Hernandez so did when they approached Defendant Ernest E. Allison and enticed him to appoint a new Board comprised of UCD allies knowing that such individuals would effect the wishes of UCD. Defendant Ernest E. Allison so did when he appointed the new Board members also with the full knowledge that they would effect UCD's wishes.

XXVI.

Because of the various events that transpired prior to such action, Plaintiff further alleged that Defendants Esmeralda Ramirez, Adan Hernandez, and Ernest E. Allison actively interfered with Plaintiff's contractual relationship with the Donna Housing Authority to further their own interests. Defendants Esmeralda Ramirez and Adan Hernandez, being allied with UCD, wanted to enhance their respective personal political careers by ensuring that the Donna Housing Authority was under the "control" of a UCD Board, and thus a UCD Executive Director. Defendant Ernest E. Allison wished to extend his tenure as Interim City Manager and was led to believe that such would occur upon appointing a new Board.

XXVII.

Consequently, Plaintiff alleges that Defendants Esmeralda Ramirez, Adan Hernandez, and Ernest E. Allison tortiously and wrongfully interfered with a contractual relationship, that existing between Plaintiff and Defendant Donna Housing Authority.

THIRD CAUSE OF ACTION

XXVIII.

In his capacity as Interim City Manager, Defendant Ernest E. Allison had, as part of his responsibilities, the duty of appointing members to the Board of Commissioners of the Donna Housing Authority, Corollary to this, the Interim City Manager is responsible for removing Board members in the event that said members begin to conduct themselves in a manner inconsistent with their charge (as Board members).

XXIX.

Defendant Ernest E. Allison was aware that UCD wanted Plaintiff out as Executive Director and Secretary of the Donna Housing Authority. Defendant Ernest E. Allison was aware that Defendant Araceli Reyes (a UCD ally) wanted to effect Plaintiff's ouster as Executive Director and Secretary of the Donna Housing Authority. Defendant Ernest E. Allison was aware that upon appointment of the Defendants Dolores Salinas, Sylvia Garza, and Jose De leon as Commissioners of the Donna Housing Authority, Defendant Araceli Reyes, as Chairman of the Board of Commissioners of the Donna Housing Authority, would have the needed support to effect Plaintiff's ouster.

XXX.

Defendant Ernest E. Allison owed a duty to the Donna Housing Authority to insure that it was an entity fulfilling its functions. Derivative to this duty was the duty to insure that the makeup of its Board of Commissioners was not such that its duties were being usurped by any one or several Board members. Further derivative was the duty owed Plaintiff, namely that the Executive Director and Secretary of the Donna

Housing Authority be allowed to discharge his obligations in such capacity without interference from said Board.

XXXI.

Defendant Ernest E. Allison breached this latter duty to Plaintiff when he failed to exercise due diligence in removing Defendant Araceli Reyes. In fact, when Plaintiff met with Defendant Ernest E. Allison on or about October 19, 1992 to discuss his situation, Defendants Ernest E. Allison stated that he did not want to remove Defendant Araceli Reyes for fear of upsetting UCD.

XXXII.

Defendant Ernest E. Allison further breached his duty to Plaintiff by failing to monitor the Commissioner's activities despite being knowledgeable about the various attempts to terminate Plaintiff.

XXXIII.

Finally, Defendant Ernest E. Allison breached his duty to Plaintiff by appointing the Board members he did knowing that they would act in an improper manner.

XXXIV.

Plaintiff alleges that his termination was foreseeable to Defendant Ernest E. Allison given the various attempts to oust Plaintiff. Ultimately, Plaintiff was terminated and as a direct and proximate result of Defendant Ernest E. Allison's negligent actions of failing to monitor the Board's actions, failing to remove Defendant Araceli Reyes, and appointing Defendants Sylvia Garza, Dolores Salinas, and Jose De leon, he lost a substantial means of his livelihood, and by these actions, lost this means of support for himself and his family, along

with the ability to engage in employment of a similar stature.

FOURTH CAUSE OF ACTION

XXXV.

Plaintiff's termination in the manner it occurred deprived Plaintiff of his property right to continue in renumerative employment which be reasonably expected to retain. The Board of Commissioners of the Donna Housing Authority is empowered to determine policies and generally administer the housing authority. The Donna Housing is a subsidiary entity of the City of Donna. Defendants Donna Housing Authority, Araceli Reyes, Sylvia Garza, Dolores Salinas, and Jose De leon therefore at all times acted under color of state and municipal law in its acting.

XXXVI.

Plaintiff's termination was substantively effective on the date that Defendants Sylvia Garza and Dolores Salinas were sworn in as Board members, on or about October 22, 1993, as evidenced by Defendant Araceli Reyes' letter of October 23, 1992 to Plaintiff wherein she effectively states that the sole reason Plaintiff was not procedurally terminated on October 22, 1992 was on advice of counsel. Defendant Araceli Reyes cements this "form over substance" philosophy by blatantly stating that Plaintiff's termination would then be effective at the end of a hearing, should one be had.

XXXVII.

On or about December 2, 1992, at Plaintiff's termination hearing, Defendant Donna Housing Authority, acting by and through Defendants Araceli Reyes, Dolores Salinas, Sylvia Garza, and Jose De leon,

refused to set a standard by which he was to be judged, despite the fact that an official standard was available, and consequently, Plaintiff was not given an effective opportunity to rebut the allegations of ineffective management levied against him before his termination became procedurally effective.

XXXVIII.

The wrongs complained of above are constitutionally mandated procedural rights which Defendants Donna Housing Authority, Araceli Reyes, Dolores Salinas, Sylvia Garza, and Jose De leon failed to afford Plaintiff. This failure is a violation of the Due Process Clause of the 14th Amendment to the United States Constitution which is actionalbe uner 42 U.S.C. §1983, as well as the 1st, 4th, 5th, and 7th Amendments to the United States Constitution.

FIFTH CAUSE OF ACTION

XXXIX.

Plaintiff repeats and allege the allegations contained in Paragraphs XVII through XXIII.

XL.

The firing of the Plaintiff, accompanied by the false and defamatory charges contained in Exhibit A and disseminated by Defendants Donna Housing Authority, Araceli Reyes, Dolores Salinas, Sylvia Garza, and Jose De leon, wrongfully deprived the Plaintiff of his constitutionally-protected liberty interest in his good name, reput reputation, honor and integrity.

XLI.

Defendants Donna Housing Authority, Araceli Reyes, Dolores Salinas, Sylvia Garza, and Jose De leon failed to provide Plaintiff with sufficiently detailed notice of the grounds for these Defendants' libelous statements. These Defendants further failed to accord Plaintiff an adequate opportunity to refute the libelous statements and clear his name before an impartial tribunal, all in violation of Plaintiff's right to procedural due process as guaranteed by the Fourteenth Amendment to the United States Constitution and made actionable by 42 U.S.C. §1983.

SIXTH CAUSE OF ACTION

XLII.

Defendants Donna Housing Authority, Araceli Reyes, Dolores Salinas, Sylvia Garza, and Jose De leon fired plaintiff in retaliation for Plaintiff's non-support of the UCD faction, i.e. a patronage dismissal, that is for failing to support the prevailing political group. The reasons contained in Exhibit A are mirages designed to conceal these Defendants' retaliation. Furthermore, Defendants' actions resulted from and were taken pursuant to official employment policy or custom of Defendant Donna Housing Authority and/or its parent, the City of Donna.

XLIII.

The action by these Defendants in firing Plaintiff was intended to deny and did deny Plaintiff his right to freedom of political belief and association which is protected by the First and Fourteenth Amendments to the United States Constitution and made actionable by 42 U.S.C. §1983.

WHEREFORE, premises considered, Plaintiff prays that Defendants be cited to appear and answer herein as required by law and that upon final trial hereof, Plaintiff have:

1. Actual damages in a sum in excess of the minimum jurisdictional limits of the Court.

2. Special damages, as set forth herein, in a sum in excess of the minimum jurisdictional limits of the Court.

3. Exemplary damages in a sum in excess of the minimal jurisdictional limits of the Court.

4. Reinstatement to the position of Executive Director and Secretary of the Donna Housing Authority.

5. Prejudgment interest as provided by law.

6. Post judgment interest as provided by law.

7. Costs of suit.

8. Reasonable attorney's fees for the actions complained in Paragraphs XXXV through XXXVIII; Paragraphs XXXIX through XLI; and Paragraphs XLII through XXLIII.

9. Such other and further relief to which Plaintiff may be justly entitled.

Respectfully submitted,

Rolando Garcia
Attorney and Counselor at Law
131 South 8th Street, Suite 10
Donna, Texas 78537
Telephone (210) 464-0171
Facsimile (210) 464-0805

BY: /S/
Rolando Garcia
State Bar ID No. 00784107

ATTORNEY FOR PLAINTIFF.

THE STATE OF TEXAS §
§
COUNTY OF HIDALGO §

BEFORE ME, the undersigned Notary Public, on this day personally appeared ROBERTO LUGO, who after being duly sworn, stated the following:

"My name if ROBERTO LUGO. I am the Plaintiff in the foregoing Plaintiff's Original Petition. I am over the age of eighteen years and am fully competent to make this affidavit. I have personal knowledge of the facts and allegations stated in the foregoing Petition and that they are true and correct."

/S/
ROBERTO LUGO

SUBSCRIBED AND SWORN TO BEFORE ME, on the 1st day of November 1993, to certify which witness my hand and seal of office.

/S/
Rosalinda Yanez, Notary Public
in and for The State of Texas,
County of Hidalgo
My commission expires: 4/26/97
"Exhibit A"

DONNA BOARD FIRES HOUSING DIRECTOR

By NOLENE HODGES
Star News Staff

DONNA--Robert Lugo, executive director of the Donna Housing Authority, was terminated--effective immediately--by the Board of Commissioners following a hearing in executive session Wednesday night.

Chairman Araceli Reyes gave only "ineffective management" as reason for the dismissal after the meeting adjourned. She said she was not at liberty to discuss the reasons. None was given in the meeting.

When the board returned to open session about 8:45 p.m., the chairman asked if there was a motion. Dolores Salinas moved to terminate Lugo immediately "based on the discussion in executive session."

Joe DeLeon provided the second.

Housing Authority Attorney Leandro David Martinez said a roll call vote was needed. Voting in favor with Salinas and DeLeon were Sylvia Garza and the chairman. Rudy Cardenas was absent.

Lugo was represented by Donna attorney Roland Garcia.

The housing board spent about 2 1/2 hours in conducting the hearing and deliberating, part of the time without the attorneys.

Lugo, who has held the position since March, said he was "going to sit back and evaluate the situation and see what my options are. It was all so quick."

Asked if he felt he had been given a fair hearing, he was advised by his attorney not to answer.

Reyes said she probably would call a special meeting to name an interim director.

Garza, Salinas and Joe DeLeon were appointed recently to the housing authority and, immediately after reorganizing, the majority of the board voted its intent to terminate Lugo.

Lugo, a former Donna mayor, has had no public comment. He requested the hearing.

Before going into the hearing, the board approved a low bid of $2,824 for 12 wall furnaces. Central Plumbing of Weslaco was the successful bidder.

DONNA: Housing Authority

COMMISSIONERS FIRE EXECUTIVE DIRECTOR

By LINDA SWAN
The Monitor

DONNA--Housing Authority commissioners fired its executive director Wednesday for "ineffective management."

The decision came after commissioners met behind closed doors for almost two and a half hours at a Wednesday meeting.

The action cemented a the commission's announced intention to fire Robert Lugo, housing authority executive director.

Commissioners would give no other specific reasons for terminating Lugo other than a prepared statement citing, "ineffective management of Donna Housing Authority complexes," for the firing.

Commissioner Sylvia Garza voted against firing Lugo, but declined comment.

"I'm just going to sit back and evaluate the situation and determine what avenues are open to me," Lugo said.

The board will schedule a special meeting soon to decide the next steps, including possible appointment of an interim director for the federal housing programs in Donna.

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

_____

ARACELI REYES, SYLVIA GARZA,
JOSE DE LEON, AND DOLORES SALINAS,
Petitioners

v.

ROBERTO LUGO,
Respondent

_____

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

_____

APPENDIX D

IN THE UNITED STATES

DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF TEXAS

McALLEN DIVISION

ROBERTO LUGO	§	
	§	
V.	§	**CIVIL ACTION**
	§	**NUMBER M-93-260**
	§	
HOUSING AUTHORITY	§	
OF THE CITY OF	§	
DONNA, ET AL	§	

MOTION OF DEFENDANT TO DISMISS UNDER RULE 12(b)(6) AND RULE 12(b)(7)

TO THE HONORABLE UNITED STATES DISTRICT COURT:

The Housing Authority Of The City Of Donna, Hidalgo County, Texas, on the one hand, and Aracelli Reyes, Sylvia Garza, Jose De Leon and Dolores Salinas (all individually and in their official capacities as commissioners of the board of The Housing Authority Of The City Of Donna, Hidalgo County, Texas), who are five of the eight defendants and who are hereafter for the purpose of convenience designated Defendants, in support of their Motion Of Defendants To Dismiss Under Rule 12(b)(6) And Rule 12(b)(7), respectfully state that:

I.
Statement Of Nature Of Case

Broadly summarized from his original petition, Plaintiff has filed this lawsuit against Defandants, alleging wrongful termination on civil grounds. With respect to Defendants specifically, Plaintiff alleges that he was employed by The Donna Housing

Authority as its executive director and secretary on March 23, 1992. On October 19, 1992, Aracelli Reyes allegedly went to Plaintiff's office and asked him to add to the agenda an item of discussion regarding the termination of Plaintiff on employment. On October 22, 1992, Defendants Garza, Salinas, and De Leon allegedly voted to notify Plaintiff of The Donna Housing Authority's intent to terminate Plaintiff. Plaintiff requested a hearing which was granted by Aracelli Reyes by letter of October 23, 1992, to Plaintiff. According to Plaintiff, the hearing was conducted on December 2, 1992, and his employment was terminated. Plaintiff contends that Defendant Reyes said that Plaintiff was terminated for ineffective management, but Plaintiff believes he was fired for not supported the United Citizens For Donna, a political group. Plaintiff alleges he never received any negative comments about his work. Finally, Plaintiff alleges that Defendant Reyes published a libelous statement when it was reported the newspaper that Plaintiff was terminated from his job for ineffective management.

Plaintiff asserts against Defendants state pendent claims of breach of contract and libel. Plaintiff asserts against Movants federal constitutional claims of denial of due process under the Fourteenth Amendment, denial of liberty interest under the Fourteenth Amendment, and violation of Plaintiff's right to political association under the First and Fourteenth Amendments. Plaintiff has asserted the federal constitutional claims under The Federal Civil Rights Act, 42 U.S.C. §1983.

II.
Grounds For Dismissal

(1) Pursuant to a reading of Plaintiff's Original Petition on file with

this Court, Defendant argues that Plaintiff has not stated a claim for breach of contract.

(2) Pursuant to a reading of Plaintiff's Original Petition on file with this Court, Defendant argues that Plaintiff has not stated a claim for a violation of the right to due process under the Fourteenth Amendment.

(3) Pursuant to a reading of Plaintiff's Original Petition on file with this Court, Defendant argues that Plaintiff has not stated a claim for a violation of the right to a liberty interest under the Fourteenth Amendment.

(4) Pursuant to a reading of Plaintiff's Original Petition on file with this Court, Defendant argues that Plaintiff has not stated a claim for a violation of a First Amendment right of political association.

(5) Plaintiff has failed to allege facts showing that The Housing Authority Of The City Of Donna, Hidalgo County, Texas, is liable for any constitutional violations. That Defendant should be dismissed under Rule 12(b)(6) and 12(b)(2).

(6) Defendants Garza, De Leon, and Salinas argue that they are not liable under §1983 since Plaintiff has failed to allege facts showing their personal involvement.

(7) Defendant Reyes, Garza, De Leon, and Salinas argue that they are entitled to qualified immunity since Plaintiff has failed to allege facts showing a constitutional violation against them.

(8) With the dismissal of the federal pendent claims, this Honorable Court should dismiss all pendent state claims.

WHEREFORE, PREMISES CONSIDERED, The Housing Authority Of The City Of Donna, Hidalgo County, Texas, Aracelli Reyes, Sylvia Garza, Jose De Leon and Dolores Salinas (all individually and in their official capacities as commissioners of the board of The Housing Authority Of The City Of Donna, Hidalgo County, Texas), who are five of the eight defendants, respectfully pray that all claims asserted by Roberto Lugo, who is Plaintiff, be dismissed; that Plaintiff take nothing by way of this lawsuit against the defendants; that all costs of Court be taxed to and against Plaintiff, if it is subsequently determined that he is not indigent; and that Defendants have all such other and further relief, both special and general and at law and in equity, to which they are justly entitled, under the circumstances.

Respectfully submitted,

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Attorneys and Counsel of Record for The Housing Authority Of The City Of Donna, Aracelli Reyes, Sylvia Garza, Jose De Leon and Dolores Salinas (all individually and in their official capacities as commissioners of the board of The Housing Authority Of The City Of Donna, Hidalgo County, Texas)Defendants

By /S/
James Ludlum, Jr.
12669000
Anthony G. Brocato, Jr.
03039001

CERTIFICATE OF SERVICE

Contemporaneously in point of date with the transmittal for filing of two originally-signed and holepunched copies of the foregoing and appended pleading to the District Clerk in McAllen, Texas, one true copy thereof was transmitted through the mails of the United States of America via Certified Mail-Return Receipt Requested-Number:

(1) P 168 801 790 to Rolando Garcia, Attorney and Counselor at Law, 131 South Eighth Street, Suite 10, Donna, Texas 78537, who is Attorney and Counsel of Record for Plaintiff; and

(2) P 168 801 791 to Mr. J. Arnold Aguilar, Willette & James, International Plaza, 3505 Boca Chica Blvd., Suite 460, Brownsville, Texas 78521.

United States District Court Southern District of Texas
FILED DEC 6 1993
Michael N. Milby, Clerk

LUDLUM & LUDLUM

By /S/
James Ludlum, Jr.

December 6, 1993

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARACELI REYES, SYLVIA GARZA,
JOSE DE LEON, AND DOLORES SALINAS,
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APPENDIX TO
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IN THE UNITED STATES

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ROBERTO LUGO	**§**	
	§	
V.	**§**	**CIVIL ACTION**
	§	**NUMBER M-93-260**
	§	
HOUSING AUTHORITY	**§**	
OF THE CITY OF	**§**	
DONNA, ET AL	**§**	

BRIEF IN SUPPORT OF MOTION OF DEFENDANTS TO DISMISS UNDER RULE 12(b)(6) AND RULE 12(b)(2)

TO THE HONORABLE UNITED STATES DISTRICT COURT:

The Housing Authority Of The City Of Donna, Hidalgo County, Texas, on the one hand, and Aracelli Reyes, Sylvia Garza, Jose De Leon and Dolores Salinas (all individually and in their official capacities as commissioners of the board of The Housing Authority Of The City Of Donna, Hidalgo County, Texas), who are five of the eight defendants and who are hereafter for the purpose of convenience designated Defendants, in support of their Brief In Support Of Motion Of Defendants To Dismiss Under Rule 12(b)(6) And Rule 12(b)(2), respectfully state that:

I.

Statement Of Nature Of Case

Broadly summarized from his original petition, Plaintiff has filed this lawsuit against Defendants, alleging wrongful termination on several grounds. With respect to Defendants specifically, Plaintiff alleges

that he was employed by The Donna Housing Authority as its executive director and secretary on March 23, 1992. On October 19, 1992, Aracelli Reyes allegedly went to Plaintiff's office and asked him to add to the agenda an item of discussion regarding the termination of Plaintiff on employment. On October 22, 1992, Defendants Garza, Salinas, and De Leon allegedly voted to notify Plaintiff of The Donna Housing Authority's intent to terminate Plaintiff. Plaintiff requested a hearing which was granted by Aracelli Reyes by letter of October 23, 1992, to Plaintiff. According to Plaintiff, the hearing was conducted on December 2, 1992, and his employment was terminated. Plaintiff contends that Defendant Reyes said that Plaintiff was terminated for ineffective management, but Plaintiff believes he was fired for not supporting the United Citizens For Donna, a political group. Plaintiff alleges he never received any negative comments about his work. Finally, Plaintiff alleges that Defendant Reyes published a libelous statement when it was reported in the newspaper that Plaintiff was terminated from his job for ineffective management.

Plaintiff asserts against Defendants state pendent claims of breach of contract and libel. Plaintiff also asserts against Defendants federal constitutional claims of denial of due process under the Fourteenth Amendment, denial of liberty interest under the Fourteenth Amendment, and violation of Plaintiff's right to political association under the First and Fourteenth Amendments. Plaintiff has asserted the federal constitutional claims under The Federal Civil Rights Act, 42 U.S.C. §1983.

II.
Grounds For Dismissal

(A) The Housing Authority Of The City Of Donna, Texas, Is Not Liable Plaintiff has named as one of the defendants in this cause, The Housing Authority Of The City Of Donna, Hidalgo County, Texas. Yet, it is clear that throughout Plaintiff's petition, and particularly at Section XXV, that Plaintiff wishes to hold The Donna Housing Authority liable for the alleged actions of Defendants Reyes, Garza, Salinas, and De Leon simply on the basis of respondeat superior. However, under 42 U.S.C. §1983, respondeat superior cannot be the basis for liability. Monell v. New York City Department Of Social Services, 436 U.S. 658 (1978). Therefore, The Housing Authority Of The City Of Donna, Hidalgo County, Texas, should be dismissed from this action.

(B) No Personal Involvement Of Garza, Salinas and De Leon Shown Plaintiff has not alleged any factual basis of constitutional violations against Garza, Salinas and De Leon. Rather, it is apparent from Plaintiff's petition that Plaintiff relies on allegations surrounding other individuals. Personal involvement is a prerequisite to any claim of constitutional wrong under 42 U.S.C. §1983. Harvey v. Andrist, 754 F.2d 569 (5th Cir. 1985), cert. denied, 471 U.S. 1126 (1985).

(C) Municipal Liability Not Established Should the Court find that The Donna Housing Authority is the equivalent of a municipal defendant that can be held liable, Defendant asserts that Plaintiff has completely failed to allege facts that could hold a municipality liable. In Monell, supra, the Supreme Court held that a governmental entity could be found liable under §1983 **only if** the entity itself causes the constitutional violation at issue. It

is only when the execution of the government's policy or custom inflicts the injury that the governmental entity may be held liable under §1983. Id. Here, Plaintiff has not established facts showing either a policy or a custom to hold a municipal defendant liable in a 1983 action. Therefore, on this alternative basis, The Housing Authority Of The City Of Donna, Hidalgo County, Texas, should be dismissed.

(D) Alleged State Pendent Claim Of Breach Of Contract Not Actionable

Plaintiff has failed to state a cause of action for breach of contract. Texas follows the employment-at-will doctrine whereby, acts in a specific contract term to the contrary, an employer is free to discharge an employee with or without notice at any time for a good or bad reason or for no reason at all. Zimmerman v. H.E. Butt Grocery Co., 932 F.2d 469 (5th Cir. 1991). Therefore, to succeed on a wrongful discharge claim based on a breach of contract, Plaintiff must first prove the existence of a contract which negates the employment-at-will rule. 923 F.2d at 471. In Plaintiff's Original Petition, Plaintiff completely fails to allege anywhere in the document the existence of an employment contract between himself and The Donna Housing Authority. Plaintiff's sole belief that a contract exists is his statement in XXIV of his original petition wherein he states "in the subject employment relationship, Plaintiff was an employee of The Donna Housing Authority, his employer. Plaintiff thus was in a contractual relationship with The Donna Housing Authority." Plaintiff's allegation that because he was an employee of The Donna Housing Authority, a contractual relationship existed, defies logic and reason. The fact that a person is an employee does not necessarily mean that a contract exists. Because Plaintiff has failed in his original petition to plead facts showing an employ-

ment contract, Plaintiff's state pendent claim of breach of contract should be dismissed.

(E) Plaintiff Has Failed To State A Claim Of Denial Of Due Process Plaintiff contends in his petition that he was denied due process. To establish a claim that Plaintiff was denied due process of law in violation of the Fourteenth Amendment, Plaintiff must prove he has a protective property interest in continued employment. Wells v. Hico Independent School District, 736 F.2d 243, 251 (5th Cir. 1984), citing Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972). The question of whether a public employee has a constitutionally protected property interest in his employment is determined by reference to state law. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538 (1985). As shown, under Texas law, an employment at will relationship exits unless the Plaintiff can allege and prove that an employment contract existed. Plaintiff has not alleged the existence of an employment contract. Therefore, Plaintiff's claim of denial of due process is frivolous and should be dismissed.

(F) Plaintiff Has Failed To State A Claim Of Denial Of A Liberty Interest Plaintiff claims that because of his firing and because a member of The Donna Housing Authority allegedly stated that the firing was for ineffective management, Plaintiff was wrongfully deprived of his "constitutionally-protected liberty interest in his good name, repute, reputation, honor and integrity." Plaintiff's allegations fail to state a claim. To establish that an employer deprived one of a liberty interest, Plaintiff had to demonstrate that false charges were brought against him that "seriously damaged his standing and association in his community" or that imposed a "stigma or other disability" that foreclosed his

freedom to take advantage of other employment opportunities." Campos v. Guillot, 743 F.2d 1123, 1125 (5th Cir. 1984).

(G) Plaintiff Has Failed To State A Claim Of Discharge For Exercising First Amendment Rights Plaintiff claims in Section XLII of his petition that he was fired in retaliation for exercising his First Amendment right of association. To establish a First Amendment claim for discharge of exercising the right of association, Plaintiff must establish (1) that he was discharged in retaliation for his political affiliation, and (2) the protectedactivity was a substantial motivating factor of his discharge. Coughlin v. Lee, 946 F.2d 1152 (5th Cir. 1991). Here, in Section XLII, Plaintiff makes the conclusory allegation that Defendants Donna Housing Authority, Reyes, Salinas, Garza, and De Leon "fired Plaintiff in retaliation for Plaintiff's non-support of the UCD faction, i.e., patronage dismissal, that is for failing to support the prevailing political group." Plaintiff completely fails to allege facts to support such a bald assertion. Early in his petition, Plaintiff alleges, again without any support, that a Donna Housing Authority board member visited Defendant Reyes "who is or was also allied with UCD". The fact that Plaintiff believes that Defendant Reyes was allied with UCD is far too tenuous of an allegation to establish that The Donna Housing Authority's firing of Plaintiff was in retaliation for Plaintiff's political association with a certain political group. Therefore, Plaintiff's First Amendment claim of retaliation for exercising the right to political association should be dismissed.

(H) Housing Authority Of The City Of Donna, Hidalgo County, Texas, Not A Proper Party Plaintiff names The Housing Authority Of The City Of Donna, Hidalgo

County, Texas, as a Defendant in his original petition. Yet, one of the elements in §1983 is that the Plaintiff show that the Defendant acted "under color of law." Adickes v. Kress, 398 U.S. 144 (1970). As a matter of law, the original petition does not state any actionable claim against The Housing Authority Of The City Of Donna, Hidalgo County, Texas, because it is not a governmental entity that exists separate and apart from The City Of Donna, Texas, that would susceptible to suit and service, for which reason all claims against The Housing Authority Of The City Of Donna, Hidalgo County, Texas, should be dismissed. Plaintiff has failed to allege any actionable governmental policy or custom on the part of The Donna Housing Authority that proximately caused the deprivation of any constitutional right of Plaintiff. Also, complaints against The Donna Housing Authority should be dismissed pursuant to Federal Rule Of Civil Procedure 12(b)(2) for a lack of jurisdiction over it as a person.

(I) **In General - Indispensable Elements To State A Claim Under 42 U.S.C. § 1983 Of The Federal Civil Rights Act Against, And To Overcome The Qualified Immunity From Suite Of, Governmental Officials And Officers** The United States Court of Appeals for the Fifth Circuit, in the landmark decision of Elliott v. Perez, 451 F.2d 1472, 1473 (5th Cir. 1985), announced essentially the elimination of notice pleadings so far as damage suits prosecuted under 42 U.S.C. § 1983 of The Federal Civil Rights Act are concerned and a year and a half later in Jacquez v. Procunier, 801 F.2d 789, 790-792 (5th Cir. 1986), recognized the **"heightened"** standard of pleading which is necessary to state a claim under 42 U.S.C. § 1983 of The Federal Civil Rights Act "by requiring plaintiff to plead facts with particularity before they may subject public

officials to trial or the vagaries of modern pretrial discovery."

The United States Court of Appeals for the Fifth Circuit squarely placed the burden of anticipating the qualified immunity defense on the shoulders of the plaintiff, when, in Elliott v. Perez, 451 F.2d 1472, 1473 (5th Cir. 1985), the Court stated that: **"... we require of trial judges that they demand that the plaintiff's complaint state with factual detail and particularity the basis of the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity."**

The qualified immunity defense involves a two-prong test. In Trejo v. Perez, 693 F.2d 482, 485 (5th Cir. 1982), the United States Court Of Appeals For The Fifth Circuit stated that:

> **"The Court effectively created a two level progressive inquiry:**
>
> > **(1) Was the law clearly established at the time? If the answer to this threshold question is no, the official is immune.**
> >
> > **(2) If the answer is yes, the immunity defense ordinarily should fail unless the official claims extraordinary circumstances and can prove that he neither knew or should have known that his acts invaded well-settled legal rights."**

Therefore, these cases collectively hold that for a complaint to state a valid claim against a governmental official under 42 U.S.C. § 1983 of The Federal Civil Rights

Act, the plaintiff must plead in the complaint:

> (1) Facts, supported with factual detail and particularity, demonstrating the factual basis for a claim under 42 U.S.C. § 1983, as opposed to mere conclusory allegations, which are insufficient to state a claim under 42 U.S.C. §1983; and
>
> (2) Facts, supported with factual detail and particularity, demonstrating why the defendant-official cannot successfully maintain a defense of immunity, as opposed to mere conclusory allegations relative thereto which are insufficient to state a claim under 42 U.S.C. § 1983; and
>
> (3) Facts, with supporting factual detail and particularity, demonstrating that the defendant-official violated a specific law which was clearly established at the time.

If, but only if, the complaint satisfies those three (3) specific and conjunctive pleading burdens which are essential to a complaint surviving dismissal under Federal Rule Of Civil Procedure 12(b)(6), then the burden shifts to the defendant-official to demonstrate the existence of extraordinary circumstances by proving that he neither knew nor should have known that his acts invaded well settled legal rights.

The United States Court Of Appeals For The Fifth Circuit has made manifestly clear the meaning of the "heightened" standard of pleading applicable to 42 U.S.C. § 1983 actions: either plead with factual specificity, or the Fifth Circuit will uphold dismissal. Leatherman v. Tarrant County Narcotics Intelligence And Coordination Unit, 954 F.2d 1054 (5th Cir. 1992) reversed on

other grounds 507 U.S. ____, 122 L.Ed. 2d 517, 113 S.Ct. ___(US 1993)[1] Defendant Aracelli Reyes, Silvia Garza, Jose De Leon and Dolores Salinas, are public officials entitled to raise qualified immunity as their defense. Plaintiff has failed to allege specific facts to overcome each of these Defendants' qualified immunity. Therefore, all claims against these Defendants should be dismissed.

(J) Supplemental Jurisdiction

With the dismissal of all federal claims, Defendants request that the Court exercise its discretion in dismissing all state claims. The law allows the Court to dismiss state claims when the Court has dismissed all claims over which it has original jurisdiction. 28 U.S.C. § 1367(c)(3)(Supp. 1992).

III.
Conclusion

All claims should be dismissed.

---

[1]The United States Supreme Court did not disturb the Fifth Circuit holding for which Leatherman here is cited (i.e., factual specificity is required to plead a violation of a constitutional right and of clearly-established law in order to overcome an official's qualified immunity from suit). The Court reversed Leatherman and Palmer v. City Of San Antonio, 810 F.2d 514 (5th Cir. 1987) on the ground that notice pleadings, not factual specificity which is required to overcome the qualified immunity from suit of a governmental official or officer, are all that are required to allege an unconstitutional governmental policy or custom claim against a governmental **entity** under 42 U.S.C. § 1983 of the Federal Civil Rights Act.

WHEREFORE, PREMISES CONSIDERED, The Housing Authority Of The City Of Donna, Hidalgo County, Texas, Aracelli Reyes, Sylvia Garza, Jose De Leon and Dolores Salinas (all individually and in their official capacities as commissioners of the board of The Housing Authority Of The City Of Donna, Hidalgo County, Texas), who are five of the eight defendants, respectfully pray that all claims asserted by Roberto Lugo, who is Plaintiff, be dismissed; that Plaintiff take nothing by way of this lawsuit against the defendants; that all costs of Court be taxed to and against Plaintiff, if it is subsequently determined that he is not indigent; and that Defendants have all such other and further relief, both special and general and at law and in equity, to which they are justly entitled, under the circumstances.

Respectfully submitted,

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Attorneys and Counsel of Record for The Housing Authority Of The City Of Donna, Aracelli Reyes, Sylvia Garza, Jose De Leon and Dolores Salinas (all individually and in their official capacities as commissioners of the board of The Housing Authority Of The City Of Donna, Hidalgo County, Texas) Defendants

By /S/
James Ludlum, Jr.
12669000
Anthony Brocato, Jr.
03039001

CERTIFICATE OF SERVICE

Contemporaneously in point of date with the transmittal for filing of two originally-signed and holepunched copies of the foregoing and appended pleading to the District Clerk in McAllen, Texas, one true copy thereof was transmitted through the mails of the United States of America via Certified Mail-Return Receipt Requested-Number:

(1) P 168 801 790 to Rolando Garcia, Attorney and Counselor at Law, 131 South Eighth Street, Suite 10, Donna, Texas 78537, who is Attorney and Counsel of Record for Plaintiff; and

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United States District Court Southern District of Texas
FILED DEC 6 1993
Michael N. Milby, Clerk

LUDLUM & LUDLUM

By /S/
James Ludlum, Jr.

December 6, 1993

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARACELI REYES, SYLVIA GARZA,
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APPENDIX TO
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APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

ROBERTO LUGO	**§**	
	§	
V.	**§**	**CIVIL ACTION**
	§	**NUMBER M-93-260**
	§	
HOUSING AUTHORITY	**§**	
OF THE CITY OF	**§**	
DONNA, ET AL	**§**	

PLAINTIFF'S RESPONSE TO MOTION OF DEFENDANT TO DISMISS UNDER RULES 12(B)(6) AND (7)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff, ROBERTO LUGO, hereinafter referred to as Plaintiff, and would respectfully show this Honorable Court as follows:

I.

In their Motion to Dismiss under Rules 12(b)(6) and (2), Defendants assert ten (8) specific grounds for dismissal, as follows:

(1) Plaintiff has not stated a claim for breach of contract;

(2) Plaintiff has not stated a claim for a violation of the right to due process under the Fourteenth Amendment;

(3) Plaintiff has not stated a claim for a violation of the right to a liberty interest under the Fourteenth Amendment;

(4) Plaintiff has not stated a claim for a violation of a First Amendment right of political association;

(5) Plaintiff has failed to allege facts that The Housing Authority of the City of Donna, Hidalgo County, Texas is liable for any constitutional violations;

(6) Plaintiff has failed to allege facts showing the involvement of Defendants Garza, De Leon, and Salinas showing their personal involvement;

(7) Because Plaintiff has failed to allege facts showing a constitutional violation by Defendants Reyes, Garza, De Leon, and Salinas, they are entitled to qualified immunity; and

(8) There being no federal claims to try in this Court, all state claims should thus be dismissed.

II.

Plaintiff disputes each of the foregoing assertions made by Defendants and in support of same, shows the following.

III.

In Section II, paragraph (A), Defendants argue that the Housing Authority of the City of Donna, Texas cannot be liable for the actions of Defendants Reyes, Garza, Salinas, and De Leon on the basis of respondent superior. In support of such, Defen-

dants cite Monell v. New York City Department of Social Services, 436 U.S. 658 (1978). Defendants reliance on Monell is misplaced however, because in the case at hand, liability on the Donna Housing Authority is not being alleged on the basis of respondeat superior. Rather, as alleged in paragraph XXXV of Plaintiff's original petition, the Donna Housing Authority, in addition to Defendants Araceli Reyes, Sylvia Garza, Dolores Salinas, and Jose De Leon, is alleged to have at all times acted under color of state and municipal law in its acting. While Monell does stand for the notion that a local government will not be held liable under 42 U.S.C. § 1983 solely because it employs a tortfeasor, a public body below the state level can be bound by individual tortfeasors. Liability under 42 U.S.C. § 1983 will attach to such a public body when the individual tortfeasor caused the harm pursuant to the laws, policy, custom or practice of that public body. Owen v. City of Independence, MO, 45 U.S. 622 (1980).

In the case at hand, Plaintiff will respectfully show unto the court that the City of Donna and the Donna Housing Authority had a policy, custom, and practice of committing the wrongs Plaintiff complains of.

IV.

Defendants state that no personal involvement has been alleged against Defendants Garza, Salinas, and De Leon. Defendants urge that the consequence of this is that there can be no claim of constitutional wrong under 42 U.S.C. § 1983. Defendants cite Harvey v. Audvist, 754 F. 2d 569 (5th Cir. 1985), cert. denied, 471 U.S. 1126 (1985) as support for the proposition that personal involvement is that sole prerequisite for liability under 42 U.S.C. § 1983 to

attach. However, Harvey also holds that in the absence of personal involvement on the part of the defendants alleged to have violated one's constitutional rights, it is sufficient to show a causal connection between an actor/defendants' conduct and the constitutional violation sought to be redressed.

Plaintiff has alleged that this latter situation occurred. In paragraph XXXXV of his original petition, Plaintiff alleges such a causal connection by alleging that upon being sworn in as board members, the result was Plaintiff's substantive termination.

V.

Plaintiff refers the Court to paragraph III herein as his response to Defendants contention that municipal liability has not been established.

VI.

Defendants argue that Plaintiff has failed to state a cause of action for the state pendent claim of breach of contract on the basis that Plaintiff was an at-will employee. In Plaintiff's original petition, he does not specifically allege breach of contract on the part of Defendant Donna Housing Authority. Plaintiff, in his second cause of action, alleges that Defendants Esmeralda Ramirez, Adan Hernandez, and Ernest E. Allison wrongfully interfered with Plaintiff's contractual relationship with the Donna Housing Authority. Thus, any discussion as to a state pendent action for breach of contract is not appropriate insofar as Plaintiff's original petition is concerned, although this issue is raised in Plaintiff's amended petition.

VII.

Defendants argue that Plaintiff's due process rights could not have been deprived because of Plaintiff's failure to allege the existence of a protective property interest. Although clarified in Plaintiff's amended petition, Plaintiff has made such an allegation and such as property interest was in fact acknowledged by Defendants. In paragraphs XXXV through XXXVIII, Plaintiff alleges that he has, as a public employee, a protected property interest in continued employment. Defendants acknowledged this fact that Plaintiff had a protected property interest in continued employment by offering a hearing, albeit a superficial one, to Plaintiff on or about October 22, 1992, and which was "held", in the loosest sense of the word, on or about December 2, 1992. The sole reason Defendants proceeded in this manner was to comply with the mandate set forth in Cleveland Board of Education v. Leudermill, 470 U.S. 532 (1985), namely that person has a (protected) private interest in retaining employment, notwithstanding the fact that state law may not specifically confer a property interest in continued employment. Cleveland Board of Education v. Leudermill, id. at 541.

VIII.

Defendants next urge that Plaintiff's allegations fail to state a claim for deprivation of his liberty interest. Defendants cite Campos v. Guillot, 743 F. 2d 1123 (5th Cir. 1984) for the proposition that the establishment of a liberty interest occurs upon the employees demonstration that his "government employer has brought false charges against him that might seriously damage his standing associations in his community", or that impose a "stigma or other disability" that forecloses "freedom

to take advantage of other employment opportunities". id at 1125.

Though clarified in Plaintiff's amended petition, Plaintiff has so alleged. In his fifth cause of action, by repeating the allegations contained in paragraphs XVII through XXIII, Plaintiff has effected the allegation that Defendants falsely released to the public on or about December 2, 1992 the statement that Plaintiff was terminated for ineffective management. As stated in paragraph XX of Plaintiff's original petition, Defendants refused to define the term "management", despite the fact that the Texas Housing Association adequately and formally does so. The resulting (false) statement made by Defendants to the public that Plaintiff was terminated for ineffective managed satisfies the standard set forth in Campos v. Guillot, namely that such a false statement "might seriously damage his (plaintiff's) standing and association in the community". id.

IX.

Defendants next urge that Plaintiff's sixth cause of action should be dismissed on the basis that no facts are alleged that would establish that would establish that Plaintiff was discharged in retaliation for his political affiliation or that the protected activity was a substantial motivating factor of his discharge. This claim is without merit. Plaintiff's entire petition is replete with references to these elements. In fact, Defendants, in their Motion to Dismiss, reiterate Plaintiff's belief that he was fired for not supporting the United Citizens for Donna, a political group. Although clarified in Plaintiff's amended petition, Plaintiff is of the original petition are sufficient to validly raise the issue.

X.

Defendants urge that all claims against the Donna housing Authority should be dismissed because it is not a governmental entity that exists separate and apart from the City of Donna, Texas. Plaintiff respectfully urges the Court to grant its Motion for Leave to Amend its petition to quash this particular issue.

In any event, Plaintiff has governmental policy or custom on the part of the Donna Housing Authority that deprived him of his constitutional rights. In paragraph XLII, of his original petition Plaintiff alleges that "Defendants' actions resulted from and were taken pursuant to official employment policy or custom of Defendant Donna Housing Authority and/or its parent, the City of Donna.

XI.

Defendants urge dismissal on the basis that Plaintiff has failed to allege specific facts to overcome Defendants' possible defense of qualified immunity. Although Plaintiff has, in his amended petition, clarified his factual allegations, Plaintiff believes that he has satisfied the heightened standard set by Leatherman v. tarrant County Narcotics Intelligence and Coordination Unit, 954 F. 2d 1054 (5th Cir. 1992), rev'd on other grounds at 507 U.S. _____ (1993).

To establish the affirmative defense of qualified immunity a Defendant must show that he was performing a discretionary function in good faith within the scope of his authority. Travis v. City of Mesquite, 830 S.W. 2d 94 (Tex. 1992). Plaintiff's original petition is replete with charges that Defendants acted willfully and maliciously, and thus sans objective good faith,

in the manner in which they terminated Plaintiff. These allegations, taken as a whole, are not of the "boilerplate" variety that upset the court in Leatherman, supra. Plaintiff is of the belief that he has adequately stated "with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity." Elliott v. Perez, 751 F. 2d 1472, 1473 (5th Cir. 1985).

WHEREFORE, PREMISES CONSIDERED, Plaintiff, ROBERTO LUGO, prays that Defendants' Motion to Dismiss under Rule 12(b)(6) and 12(b)(7) be denied

Respectfully submitted,

Rolando Garcia
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131 South 8th Street, Suite 10
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Telephone (210) 464-0171
Facsimile (210) 464-0805

BY: /S/
Rolando Garcia
Federal ID No. 15870

ATTORNEY FOR PLAINTIFF.

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 1994, a true and correct copy of the above and foregoing document was mailed, certified, return receipt requested to all counsel of record.

Respectfully submitted,

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Telephone (210) 464-0171
Facsimile (210) 464-0805

BY: /S/
Rolando Garcia
Federal ID No. 15870

ATTORNEY FOR PLAINTIFF.

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARACELI REYES, SYLVIA GARZA,
JOSE DE LEON, AND DOLORES SALINAS,
Petitioners

v.

ROBERTO LUGO,
Respondent

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

ROBERTO LUGO	§	
	§	
vs.	§	
	§	
HOUSING AUTHORITY OF	§	
THE CITY OF DONNA,	§	
HIDALGO COUNTY, TEXAS;	§	
ARACELI REYES, SYLVIA	§	
GARZA, JOSE DE LEON,	§	
AND DOLORES SALINAS,	§	
ALL INDIVIDUALLY AND	§	
IN THEIR CAPACITY AS	§	
COMMISSIONERS OF THE	§	
BOARD OF THE HOUSING	§	CIVIL CASE
AUTHORITY OF THE CITY	§	NO. M-93-260
OF DONNA, HIDALGO	§	
COUNTY, TEXAS; ERNEST	§	
E. ALLISON,	§	
INDIVIDUALLY AND IN	§	
HIS CAPACITY AS	§	
INTERIM CITY MANAGER	§	
OF THE CITY OF DONNA,	§	
HIDALGO COUNTY, TEXAS;	§	
ESMERALDA RAMIREZ AND	§	
ADAN HERNANDEZ,	§	
INDIVIDUALLY AND IN	§	
THEIR CAPACITY AS	§	
COUNCIL MEMBERS OF	§	
THE CITY OF DONNA,	§	
HIDALGO COUNTY, TEXAS	§	

PLAINTIFF'S FIRST AMENDED PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, ROBERTO LUGO, Plaintiff, complaining of the HOUSING AUTHORITY OF THE CITY OF DONNA, HIDALGO COUNTY, TEXAS; ARACELI REYES, SYLVIA GARZA, JOSE DE LEON, AND DOLORES SALINAS, ALL INDIVIDUALLY AND IN THEIR CAPACITY AS COMMISSIONERS OF THE BOARD OF THE HOUSING AUTHORITY OF THE CITY OF

DONNA, HIDALGO COUNTY, TEXAS; ERNEST E. ALLISON, INDIVIDUALLY AND IN HIS CAPACITY AS INTERIM CITY MANAGER OF THE CITY OF DONNA, HIDALGO COUNTY, TEXAS; ESMERALDO RAMIREZ AND ADAN HERNANDEZ, INDIVIDUALLY AND IN THEIR CAPACITY AS COUNCIL MEMBERS OF THE CITY OF DONNA, HIDALGO COUNTY, TEXAS; AND THE CITY OF DONNA, HIDALGO COUNTY, TEXAS, Defendants, and for cause of action would respectfully show the Court as follows:

I.

Plaintiff, ROBERTO LUGO, is an individual residing in Donna, Hidalgo County, Texas.

Defendant HOUSING AUTHORITY OF THE CITY OF DONNA, HIDALGO COUNTY, TEXAS, is an entity of the City of Donna formed and authorized to provide housing for residents with low income in the Donna, Hidalgo County, Texas area. It has its offices at 705 Silver Avenue, Donna, Hidalgo County, Texas, and it has been served with citation by certified mail, return receipt requested, by serving Araceli Reyes, Chairman, at P.O. Box 667, Donna, Texas 78537.

Defendant, ARACELI REYES, is an individual who serves, or has served, as a Commissioner on the Board of the Housing Authority of the City of Donna, Hidalgo County, Texas. She has been served with process individually and in her capacity as a Commissioner on the Board at 513 West Frontage #7, Donna, Texas 78537.

Defendant, SYLVIA GARZA, is an individual who serves, or has served, as a Commissioner on the Board of the Housing Authority of the City of Donna, Hidalgo County, Texas. She has been served with process individually and in her capacity as a Commissioner on the Board at 210 S. 17th St., Donna, Texas 78537.

Defendant, JOSE DE LEON, is an individual who serves, or has served, as a Commissioner on the Board of the Housing Authority of the City of Donna, Hidalgo County, Texas. He has been served with process individually and in his capacity as a Commissioner on the Board at 308 Casiano St., Donna, Texas 78537.

Defendant, DOLORES SALINAS, is an individual who serves, or has served, as a Commissioner on the Board of the Housing Authority of the City of Donna, Hidalgo County, Texas. She has been served with process individually and in her capacity as a Commissioner on the Board at Rt. 5, Box 605, Donna, Texas 78537.

Defendant, ERNEST E. ALLISON, is an individual who has been Interim City Manager of the City of Donna, Hidalgo County, Texas. He has been served with process individually and in his capacity as Interim City Manager of the City of Donna, Hidalgo County, Texas, at North Valley View Road, Donna, Texas 78537.

Defendant, ESMERALDA RAMIREZ, is an individual who is or has been Council Member of the City of Donna, Hidalgo County, Texas. She has been served with process individually and in her capacity as Council Member of the City of Donna, Hidalgo County, Texas. She can be served with process individually and in his capacity as Council Member of the City of Donna, Hidalgo County, Texas at 314 N. 7th St., Donna, Texas 78537.

Defendant, ADAN HERNANDEZ, is an individual who is or has been Council Member of the City of Donna, Hidalgo County, Texas. He has been served with process individually and in his capacity as Council Member of the City of Donna, Hidalgo County, Texas, at 210 N. 8th St., Donna, Texas 78537.

Defendant, THE CITY OF DONNA, HIDALGO COUNTY, TEXAS, is a municipality of the State of Texas and the parent entity of Defendant Housing Authority of the City of Donna, Hidalgo County, Texas. It has its offices at 307 South 12 Street, Donna, Texas 78537. It may be served with citation by certified mail, return receipt requested, by serving its City Manager, Roberto Diaz-De Leon at 307 S. 12th St., Donna, Texas 78537, although no service is necessary at this time.

II.

Whenever is alleged in this petition that the Housing Authority of the City of Donna, Hidalgo County, Texas or the City of Donna, Hidalgo County, Texas did any act or thing, it is intended to mean that its Board of Commissioners or City Council members, respectively, did such act or thing and that at the time such act or thing was done, it was done with full authority and/or was done in the normal or routine course and scope of serving as a Commissioner of the Housing Authority of the City of Donna, Hidalgo County, Texas, hereinafter Donna Housing Authority, or as a Council Member of the City of Donna, Hidalgo County, Texas, hereinafter, City of Donna, respectively.

III.

Venue of this action is proper in this county because the cause of action accrued in whole or in part in the county of suit, Hidalgo County, Texas.

IV.

On or about March 23, 1992, Plaintiff entered into employment with the Donna Housing Authority an antonymous and operating division/department of the City of Donna for the position of Executive Director and

Secretary. The duties of Plaintiff in this regard included administering public housing projects of approximately 130 units, administering Section 8 housing with approximately 230 landlords and tenants, communicating with representatives of the Department of Housing and Urban Development, and generally overseeing the building and/or remodeling of housing unit.

V.

At the time of appointment, the Board of Commissioners of the Donna Housing Authority was compromised of Jose Yañez, Jesus Padilla, Rudy Cardenas, Cecilio Sauceda, and Adalberto Garza. The Board of Commissioners of the Donna Housing Authority had been appointed by then Donna Mayor Hector Casiano and not by the City Manager of the City of Donna.

VI.

On or about March 25, 1993, Defendant Ernest E. Allison, along with Defendant City Council Members Esmeralda Ramirez and Adan Hernandez approached Donna Housing Authority Commissioner Adalberto Garza to complain about Plaintiff and asked him to terminate Plaintiff.

VII.

On or about April 25, 1993, Plaintiff had occasion to speak to Defendant City Council members Esmeralda Ramirez and Adan Hernandez about Plaintiff's job where both individuals admitted that UCD wanted Plaintiff removed from his position as Executive Director and Secretary. (UCD refers to the United Citizens for Donna, one of several political groups existing in the City of Donna, and to which Defendants Esmeralda Ramirez and Adan Hernandez are or were publicly allied with.) Plaintiff, on this

same day, approached Defendant Ernest E. Allison and Board member Adalberto Garza who confirmed that UCD was indeed interested in effecting Plaintiff's ouster as Executive Director and Secretary because "Casiano's Board had hired him", i.e. a non-UCD Board of Commissioners of the Donna Housing Authority.

VIII.

On or about June 5, 1992, Plaintiff met with Dan McKenna, a UCD member who stated that his job had been discussed at a UCD meeting. At this meeting or meetings, Mr. McKenna reiterated what was becoming apparent to Plaintiff, namely that UCD wanted him out (as Executive Director and Secretary).

IX.

On or about October 5, 1992, Plaintiff received a letter from Defendant Ernest E. Allison, informing him that he had appointed three new (and UCD allied) Commissioners upon the urging of Defendants Esmeralda Ramirez and Adan Hernandez who sought "control" over the Donna Housing Authority and who had promised him (Defendant Ernest E. Allison) that his tenure as Interim City Manager would be extended if he did so.

XII.

On or about October 22, 1993, a Donna Housing Authority Board of Commissioners meeting was held to swear-in Defendants Sylvia Garza, Dolores Salinas, and Jose De Leon as new Board members. At this same meeting, the Donna Housing Authority, after a motion by newly appointed Board member and Defendant Sylvia Garza, voted to notify Plaintiff of its intent to terminate him from his position as Executive Director and Secretary.

XIII.

Plaintiff timely requested a hearing pursuant to the Donna Housing Authority's Personnel Policy, Resolution #81-13, and as granted to him by Defendant Araceli Reyes by letter dated October 23, 1992. This letter also reflected what had become obvious to Plaintiff, that his termination was substantively effective at the aforementioned October 22, 1992 meeting when Defendant Araceli Reyes wrote, "If you elect to have a hearing, your termination will not be effective until the conclusion of that hearing."

XIV.

On or about November 9, 1992, Defendant Araceli Reyes wrote Plaintiff to acknowledge his request for a hearing and submitted to him the list of charges that would be used at the hearing, which list included "ineffective management of the Donna Housing Authority complexes".

XV.

At the December 2, 1992 hearing and while in executive session, Plaintiff attempted to have the term "management" defined so as to set the standard by which he was to be judged. Plaintiff offered the definition as set forth by the Texas Housing Association and was prepared to rebut the Donna Housing Authority's charges based on this standard. The Donna Housing Authority, however, refused to get a standard and proceed to terminate Plaintiff from his position as Executive Director and Secretary of the Donna Housing Authority.

XVI.

At the conclusion of the meeting, the Donna Housing Authority Board, by and

through its Chairman, Defendant Araceli Reyes, in a prepared statement stated that Plaintiff was terminated for "ineffective management of the Donna Housing Authority complexes".

XVII.

Since his appointment, Plaintiff had been dedicated, loyal, and sincere about his work at the Donna Housing Authority. Plaintiff obtained the appropriate certification as required by the Department of Housing and Urban Development immediately after beginning his tenure. Plaintiff never received any negative comments from the Board of the Donna Housing Authority with respect to his job performance. In fact, Plaintiff feels strongly that he was duly performing his duties as Executive Director and Secretary. Not until the Board of the Donna Housing Authority provided him with a list of charges after voting on its intent to terminate him did Plaintiff have an inkling that his job performance was poor. Ultimately, Plaintiff was terminated for reasons after he had substantively and effectively been wrongfully terminated.

FIRST CAUSE OF ACTION

XVIII.

On or about December 3, 1992, Defendant City of Donna, through Defendant Donna Housing Authority, by and through its Chairman, Defendant Araceli Reyes, well knowing the premises, and intending to injure Plaintiff and to deprive him of his good name, fame, credit, business, and reputation, did maliciously and unlawfully make and publish of and concerning the Plaintiff, false, scandalous, unlawful, defamatory, and malicious statements and libel attached as

Exhibit A and incorporated by reference as if fully set out herein.

XIX.

The statements contained in the two newspaper articles in Exhibit A against Plaintiff are false. Such statements are libelous and injurious to Plaintiff in that they characterize and refer to Plaintiff as a person not worthy of trust and incompetent in performing his job responsibilities.

XX.

Defendants City of Donna, Donna Housing Authority, Araceli Reyes, Sylvia Garza, Dolores Salinas, and Jose De Leon well knew the aforementioned statements were untrue when they were made, and these Defendants had actual notice of the resulting foreseeable damages to Plaintiff of their claim, especially considering the fact that these Defendants refused to set a standard against which Plaintiff of their claim, especially considering the fact that these Defendants refused to set a standard against which Plaintiff was to be judged when one was available and brought to the attention of these Defendants by Plaintiff.

XXI.

Despite this, these Defendants did maliciously and wantonly intend to injure Plaintiff simultaneous with their distributing for publication in the newspapers and radio and television stations the statement that Plaintiff was terminated for ineffective management; and that accounts of these Defendant's libelous statements were published in said newspapers. Accounts published in the newspapers and attached hereto and incorporated by reference as if fully set out herein as Exhibit A.

XXII.

By reason of said publication and widespread circulation of the said false, scandalous, malicious, defamatory and libelous reason for Plaintiff's termination, Plaintiff has been subjected to scandal, scorn, contempt and distrust among his neighbors, colleagues, business acquaintances, and other community members, and has thus suffered injury to his reputation, feeling, peace of mind, and general sense of well-being.

XXIII.

As a direct and proximate result of these Defendants effecting publication of the false statement hereinabove complained of, Plaintiff lost a substantial means of his livelihood, and by Defendants' action, lost a substantial means of support for himself and family, and the ability to be engaged in employment requiring similar skills, training, and experience.

SECOND CAUSE OF ACTION

XXIV.

In the subject employment relationship, Plaintiff was an employee of the City of Donna, through the Donna Housing Authority, his employer. Plaintiff thus was in a contractual relationship with the City of Donna and the Donna Housing Authority. The Donna Housing Authority is a body generally charged with establishing programs of low-income housing for low-income families of the community. Its policies and procedures are set by a 5-member Board of Commissioners who are, in the City of Donna, appointed by the City Manager. These commissioners serve as the governing officers of the Donna Housing Authority. Their roles is similar to that of the members of the board of

directors of a private corporation. Among it's principal responsibilities are hiring, and thus ultimately controlling the employment fate, of the Executive Director, whose charge it is to manage the day-to-day operations of the housing authority.

XXV.

Plaintiff was appointed to the position of Executive Director by such a Board on or about March 23, 1992 and was discharging his obligations pursuant to his contractual relationship with the City of Donna and the Donna Housing Authority until his termination. Defendants Esmeralda Ramirez, Adan Hernandez, and Ernest E. Allison knew that Plaintiff was in a contractual relationship with the City of Donna and the Donna Housing Authority because of their respective official capacities of the City of Donna, Despite this knowledge, Defendants Esmeralda Ramirez, Adan Hernandez and Ernest E. Allison actively, knowingly, intentionally, and maliciously nonetheless effected Plaintiff's termination from his employment as Executive Director and Secretary of the Donna Housing Authority by persuading it, through its governing body, the Board of Commissioners, to so do. Defendants Esmeralda Ramirez and Adan Hernandez so did when they approached Defendant Ernest E. Allison and enticed him to appoint a new Board comprised of UCD allies knowing that such individuals would effect the wishes of UCD. Defendant Ernest E. Allison so did when he appointed the new Board members also with the full knowledge that they would effect UCD's wishes.

XXVI.

Because of the various events that transpired prior to such action, Plaintiff further alleges that Defendants Esmeralda Ramirez, Adan Hernandez, and Ernest E.

Allison actively interfered with Plaintiff's contractual relationship with the Donna Housing Authority to further their own interests. Deendants Esmeralda Ramirez and Adan Hernandez, being allied with UCD, wanted to enhance their respective personal political careers by ensuring that the Donna Housing Authority was under the "control" of a UCD Board, and thus a UCD Executive Director. Defendant Ernest E. Allison wished to believe that such would occur upon appointing a new Board.

XXVII.

Consequently, Plaintiff alleges that Defendants Esmeralda Ramirez, Adan Hernandez, and Ernest E. Allison tortiously and wrongfully interfered with a contractual relationship, that existing between Plaintiff and Defendants City of Donna and the Donna Housing Authority.

THIRD CAUSE OF ACTION

XXVIII.

In his capacity as Interim City Manager, Defendant Ernest E. Allison had, as part of his responsibilities, the duty of appointing members to the Board of Commissioners of the Donna Housing Authority. Corollary to this, the Interim City Manager is responsible for removing Board members in the event that said members begin to conduct themselves in a manner inconsistent with their charge (as Board members).

XXIX.

Defendant Ernest E. Allison was aware that UCD wanted Plaintiff out as Executive Director and Secretary of the Donna Housing Authority. Defendant Ernest E. Allison was aware that Defendant Araceli Reyes (a UCD ally) wanted to effect Plaintiff's ouster as

Executive Director and Secretary of the Donna Housing Authority. Defendant Ernest E. Allison was aware that upon appointment of the Defendants Dolores Salinas, Sylvia Garza, and Jose De Leon as Commissioners of the Donna Housing Authority, Defendant Araceli Reyes, as Chairman of the Board of Commissioners of the Donna Housing Authority, would have the needed support to effect Plaintiff's ouster.

XXX.

Defendant Ernest E. Allison owed a duty to the Donna Housing Authority to insure that it was an entity fulfilling its functions. Derivative to this duty was the duty to insure that the makeup of its Board of Commissioners was not such that its duties were being usurped by any one or several Board members. Further derivative was the duty owed Plaintiff, namely that the Executive Director and Secretary of the Donna Housing Authority be allowed to discharge his obligations in such capacity without interference from said Board.

XXXI.

Defendant Ernest E. Allison breached this latter duty to Plaintiff when he failed to exercise due diligence in removing Defendant Araceli Reyes. In fact, when Plaintiff met with Defendant Ernest E. Allison on or about October 19, 1992 to discuss his situation, Defendant Ernest E. Allison stated that he did not want to remove Defendant Araceli Reyes for fear of upsetting UCD.

XXXII.

Defendant Ernest E. Allison further breached his duty to Plaintiff by failing to monitor the Commissioner's activities despite being knowledgeable about the various attempts to terminate Plaintiff.

XXXIII.

Finally, Defendant Ernest E. Allison breached his duty to Plaintiff by appointing the Board members he did knowing that they would act in an improper manner.

XXXIV.

Plaintiff alleges that his termination was foreseeable to Defendant Ernest E. Allison given the various attempts to oust Plaintiff. Ultimately, Plaintiff was terminated and as a direct and proximate result of Defendant Ernest E. Allison's negligent actions of failing to monitor the Board's actions, failing to remove Defendant Araceli Reyes, and appointing Defendants Sylvia Garza, Dolores Salinas, and Jose De Leon, he lost a substantial means of his livelihood, and by these actions, lost this means of support for himself and his family, along with the ability to engage in employment of a similar stature.

FOURTH CAUSE OF ACTION

XXXV.

Plaintiff's termination in the manner it occurred deprived Plaintiff of his property right to continue in renumerative employment which be reasonably expected to retain. The Board of Commissioners of the Donna Housing Authority is empowered to determine policies and generally administer the housing authority. The Donna Housing is a subsidiary entity of the City of Donna. Defendants City of Donna, Donna Housing Authority, Araceli Reyes, Sylvia Garza, Dolores Salinas, and Jose De Leon therefore at all times acted under color of state and municipal law in its acting.

XXXVI.

Plaintiff's termination was substantively effective on the date that Defendants Sylvia Garza, Dolores Salinas and Jose De Leon were sworn in as Board members, on or about October 22, 1992, as evidenced by Defendant Araceli Reyes' letter of October 23, 1992 to Plaintiff wherein she effectively states that the sole reason Plaintiff was not procedurally terminated on October 22, 1992 was on advice of counsel. Defendant Araceli Reyes cements this "form over substance" philosphy by blatantly stating that Plaintiff's termination would then be effective at the end of a hearing, should one be had.

XXXVII.

On or about December 2, 1992, at Plaintiff's termination hearing, Defendant Donna Housing Authority, acting by and through Defendants Araceli Reyes, Dolores Salinas, Sylvia Garza, and Jose De Leon, refused to set a standard by which he was to be judged, despite the fact that an official standard was available, and consequently, Plaintiff was not given an effective opportunity to rebut the allegations of ineffective management levied against him before his termination became procedurally effective.

XXXVIII.

The wrongs complained of above are constitutionally mandated procedural rights which Defendants City of Donna, Donna Housing Authority, Araceli Reyes, Dolores Salinas, Sylvia Garza, and Jose De Leon failed to afford Plaintiff. This failure is a violation of the Due Process Clause of the 14th Amendment to the United States Constitution which is actionable under 42 U.S.C. §1983, as well as the 1st, 4th, 5th, and 7th

Amendments to the United States Constitution.

FIFTH CAUSE OF ACTION

XXXIX.

Plaintiff repeats and alleges the allegations contained in Paragraphs XVII through XXIII.

XL.

The firing of the Plaintiff, accompanied by the false and defamatory charges contained in Exhibit A and disseminated by Defendants City of Donna, Donna Housing Authority, Araceli Reyes, Dolores Salinas, Sylvia Garza, and Jose De Leon, wrongfully deprived the Plaintiff of his constitutionally-protected liberty interest in his good name, reputation, honor and integrity.

XLI.

Defendants City of Donna, Donna Housing Authority, Araceli Reyes, Dolores Salinas, Sylvia Garza, and Jose De Leon failed to provide Plaintiff with sufficiently detailed notice of the grounds for these Defendants' libelous statements. These Defendants further failed to accord Plaintiff an adequate opportunity to refute the libelous statements and clear his name before an impartial tribunal, all in violation of Plaintiff's right to procedural due process as guaranteed by the Fourteenth Amendment to the United States Constitution and made actionable by 42 U.S.C. §1983.

SIXTH CAUSE OF ACTION

XLII.

Defendants City of Donna, Donna Housing Authority, Araceli Reyes, Dolores Salinas,

Sylvia Garza, and Jose De Leon fired Plaintiff in retaliation for Plaintiff's non-support of the UCD faction, i.e. a patronage dismissal, that is for failing to support the prevailing political group. The reasons contained in Exhibit A are mirages designed to conceal these Defendants' retaliation. Furthermore, Defendants' actions resulted from and were taken pursuant to official employment policy or custom of Defendants City of Donna and the Donna Housing Authority.

XLIII.

The action by these Defendants in firing Plaintiff as intended to deny and did deny Plaintiff his right to freedom of political belief and association which is protected by the First and Fourteenth Amendments to the United States Constitution and made actionable by 42 U.S.C. §1983.

SEVENTH CAUSE OF ACTION

XLIV.

Plaintiff repeats and alleges the allegations contained in Paragraphs XVII. through XXIII.

Plaintiff, before his termination, was the Executive Director and Secretary of Defendant Donna Housing Authority, and thus was an indirect employee of Defendant City of Donna. Although arguably an at-will employee, Plaintiff believes that Defendants City of Donna and the Donna Housing Authority were limited on their right to terminate Plaintiff for alternative reasons. By being given an opportunity for a hearing to rebut the charges made against him, Defendants City of Donna and the Donna Housing Authority acknowledged their obligation, pursuant to their personnel policy, to discharge only for cause. Such cause not having been shown

pursuant to an implied contract theory, Plaintiff believes that he was wrongfully terminated from his employment with the Donna Housing Authority and the City of Donna.

XLVI.

Alternatively, in the event it is determined that no contractual limitation was cloaked upon Defendants City of Donna and the Donna Housing Authority, Plaintiff believes that his employment with the Donna Housing Authority and thus, the City of Donna, was wrongfully severed because of Plaintiff's non-alliance with UCD. As a citizen of the State of Texas and of the United States, Plaintiff enjoys the right to freely associate himself with any or no political organization. Plaintiff believes that his termination for non-alliance violates the public policy of the State of Texas and such conduct on the part of the Donna Housing Authority and the City of Donna is actionable as wrongful discharge.

WHEREFORE, premises considered, Plaintiff prays that Defendants be cited to appear and answer herein as required by law and that upon final trial hereof, Plaintiff have:

1. Actual damages in a sum in excess of the minimum jurisdictional limits of the Court;

2. Special damages, as set forth herein, in a sum in excess of the minimum jurisdictional limits of the Court;

3. Exemplary damages in a sum in excess of the minimal

jurisdictional limits of the Court;

4. Reinstatement to the position of Executive Director and Secretary of the Donna Housing Authority;

5. Prejudgment interest as provided by law;

6. Post judgment interest as provided by law;

7. Costs of suit;

8. Reasonable attorney's fees for the actions complained of in Paragraphs XXXV through XXVIII; Paragraphs XXXIX through XLI; and Paragraphs XLII through XXLIII; and

9. Such other and further relief to which Plaintiff may be justly entitled.

Respectfully submitted,

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Telephone (210) 464-0171
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BY: /S/
Rolando Garcia
Federal ID No. 15870

ATTORNEY FOR PLAINTIFF.

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of April, 1994, a true and correct copy of the above and foregoing document was mailed, certified, return receipt requested to all counsel of record.

Respectfully submitted,

Rolando Garcia
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Telephone (210) 464-0171
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BY: /S/
Rolando Garcia
Federal ID No. 15870

ATTORNEY FOR PLAINTIFF.

United States District Court
Southern District of Texas
FILED MAY 6 1994
Michael N. Milby, Clerk

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARACELI REYES, SYLVIA GARZA,
JOSE DE LEON, AND DOLORES SALINAS,
Petitioners

v.

ROBERTO LUGO,
Respondent

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX H

IN THE UNITED STATES

DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF TEXAS

McALLEN DIVISION

ROBERTO LUGO	**§**	
	§	
V.	**§**	**CIVIL ACTION**
	§	**NUMBER M-93-260**
	§	
HOUSING AUTHORITY	**§**	
OF THE CITY OF	**§**	
DONNA, ET AL	**§**	

MOTION OF DEFENDANT TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT UNDER RULE 12(b)(6) AND RULE 12(b)(2)

TO THE HONORABLE UNITED STATES DISTRICT COURT:

The Housing Authority Of The City Of Donna, Hidalgo County, Texas, on the one hand, and Aracelli Reyes, Sylvia Garza, Jose De Leon and Dolores Salinas (all individually and in their official capacities as commissioners of the board of The Housing Authority Of The City Of Donna, Hidalgo County, Texas), who are five of the eight defendants and who are hereafter for the purpose of convenience designated Defendants, in support of their Motion Of Defendants To Dismiss Plaintiff's First Amended Complaint Under Rule 12(b)(6) And Rule 12(b)(2), respectfully state that:

I.
Statement Of Nature Of Case

Broadly summarized from his First Amended Complaint, Plaintiff has filed this lawsuit against all Defendants, alleging wrongful termination on several grounds.

With respect to these Defendants specifically, Plaintiff alleges that he was employed by The Donna Housing Authority as its executive director and secretary on March 23, 1992. Subsequently, Ernest E. Allison, Esmeralda Ramirez, and Adan Hernandez allegedly approached the Donna Housing Authority Commissioner, Adalberto Garza to complain about Plaintiff and asked Mr. Garza to terminate Plaintiff from his job. Plaintiff states he met with Dan McKenna, a UCD (United Citizens for Donna) member who allegedly "reiterated what was becoming apparent to Plaintiff, namely that UCD wanted him out." On October 22, 1992, Defendants Garza, Salinas, and De Leon allegedly voted to notify Plaintiff of The Donna Housing Authority's intent to terminate Plaintiff. Plaintiff requested a hearing which was granted by Aracelli Reyes by letter of October 23, 1992, to Plaintiff. Additionally, Plaintiff acknowledges that on November 9, 1992, Aracelli Reyes wrote Plaintiff to acknowledge his request for a hearing and submitted to Plaintiff a list of charges, including the complaint of "ineffective management of The Donna Housing Authority complexes", that would be used at the hearing. According to Plaintiff, the hearing was conducted on December 2, 1992, and his employment was terminated. Plaintiff contends that Defendant Reyes said that Plaintiff was terminated for ineffective management, but Plaintiff believes he was fired for not supporting the United Citizens For Donna, a political group. Plaintiff alleges he never received any negative comments about his work. Finally, Plaintiff alleges that Defendant Donna Housing Authority, through Defendant Reyes, published a libelous statement when it was reported in the newspaper that Plaintiff was terminated from his job for ineffective management.

Plaintiff asserts against Defendants state pendent claims of breach of contract

and libel. Plaintiff also asserts against Defendants federal constitutional claims of denial of due process under the Fourteenth Amendment, denial of liberty interest under the Fourteenth Amendment, and violation of Plaintiff's right to political association under the First and Fourteenth Amendments. Plaintiff has asserted the federal constitutional claims under The Federal Civil Rights Act, 42 U.S.C. §1983.

II.
Grounds For Dismissal

(1) Pursuant to a reading of Plaintiff's First Amended Complaint on file with this Court, Defendant argues that Plaintiff has not stated a claim for breach of contract.

(2) Pursuant to a reading of Plaintiff's First Amended Complaint on file with this Court, Defendant argues that Plaintiff has not stated a claim for a violation of the right to due process under the Fourteenth Amendment.

(3) Pursuant to a reading of Plaintiff's First Amended Complaint on file with this Court, Defendant argues that Plaintiff has not stated a claim for a violation of the right to a liberty interest under the Fourteenth Amendment.

(4) Pursuant to a reading of Plaintiff's First Amended Complaint on file with this Court, Defendant argues that Plaintiff has not stated a claim for a violation of a First Amendment right of political association.

(5) Defendant Housing Authority of the City of Donna, Hidalgo County, Texas, is not a proper party and should be dismissed under Rule 12(b)(2).

(6) Plaintiff has failed to allege facts showing that The Housing Authority Of The City Of Donna, Hidalgo County, Texas, is liable for any constitutional violations. That Defendant should be dismissed under Rule 12(b)(6).

(7) Defendants Reyes, Garza, De Leon, and Salinas argue that they are not libel under §1983 since Plaintiff has failed to allege facts showing their personal involvement.

(8) Defendant Reyes, Garza, De Leon, and Salinas argue that they are entitled to qualified immunity under 42 U.S.C. § 1983 since Plaintiff has failed to allege facts showing a constitutional violation against them.

(9) Pursuant to a reading of Plaintiff's First Amended Complaint on file with this Court, Defendant argues that Plaintiff has failed to state a claim for liable or defamation since all Defendants are entitled to sovereign immunity under Texas law with respect to those claims.

(10) With the dismissal of the federal claims and in the event that the Plaintiff's state pendent claims are not dismissed on the merits, Defendants urge this Honorable Court to dismiss all remaining pendent state claims without prejudice.

WHEREFORE, PREMISES CONSIDERED, The Housing Authority Of The City Of Donna, Hidalgo County, Texas, Aracelli Reyes, Sylvia Garza, Jose De Leon and Dolores Salinas (all individually and in their official capacities as commissioners of the board of The Housing Authority Of The City Of Donna, Hidalgo County, Texas), who are five of the eight defendants, respectfully pray that all claims asserted by Roberto Lugo, who is Plaintiff, be dismissed; that

Plaintiff take nothing by way of this lawsuit against the defendants; that all costs of Court be taxed to and against Plaintiff, if it is subsequently determined that he is not indigent; and that Defendants have all such other and further relief, both special and general and at law and in equity, to which they are justly entitled, under the circumstances.

Respectfully submitted,

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By /S/
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CERTIFICATE OF SERVICE

Contemporaneously in point of date with the transmittal for filing of two originally-signed and holepunched copies of the foregoing and appended pleading to the District Clerk in McAllen, Texas, one true copy thereof was transmitted through the mails of the United States of America via Certified Mail-Return Receipt Requested-Number:

(1) P 168 802 182 to Rolando Garcia, Attorney and Counselor at Law, 131 South Eighth Street, Suite 10, Donna, Texas 78537, who is Attorney and Counsel of Record for Plaintiff; and

(2) P 168 802 186 to Mr. J. Arnold Aguilar, Willette & James, International Plaza, 3505 Boca Chica Blvd., Suite 460, Brownsville, Texas 78521.

United States District Court Southern District of Texas
Filed MAY 20, 1994
MICHAEL N. MILBY, CLERK

LUDLUM & LUDLUM

/S/
James Ludlum, Jr.

May 20, 1994

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARACELI REYES, SYLVIA GARZA,
JOSE DE LEON, AND DOLORES SALINAS,
Petitioners

v.

ROBERTO LUGO,
Respondent

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX I

IN THE UNITED STATES

DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF TEXAS

McALLEN DIVISION

ROBERTO LUGO	§	
	§	
V.	§	CIVIL ACTION
	§	NUMBER M-93-260
	§	
HOUSING AUTHORITY	§	
OF THE CITY OF	§	
DONNA, ET AL	§	

BRIEF IN SUPPORT OF MOTION OF DEFENDANTS TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT UNDER RULE 12(b)(6) AND RULE 12(b)(2)

TO THE HONORABLE UNITED STATES DISTRICT COURT:

The Housing Authority Of The City Of Donna, Hidalgo County, Texas, on the one hand, and Aracelli Reyes, Sylvia Garza, Jose De Leon and Dolores Salinas (all individually and in their official capacities as commissioners of the board of The Housing Authority Of The City Of Donna, Hidalgo County, Texas), who are five of the eight defendants and who are hereafter for the purpose of convenience designated "Defendants", in support of their Brief In Support Of Motion Of Defendants To Dismiss Plaintiff's First Amended Complaint Under Rule 12(b)(6) And Rule 12(b)(2), respectfully state that:

I.
Statement Of Nature Of Case

Broadly summarized from his First Amended Petition, Plaintiff has filed this

lawsuit against all Defendants, alleging wrongful termination on several grounds. With respect to these Defendants specifically, Plaintiff alleges that he was employed by The Donna Housing Authority as its executive director and secretary on March 23, 1992. Subsequently, Ernest E. Allison, Esmeralda Ramirez, and Adan Hernandez allegedly approached the Donna Housing Authority Commissioner, Adalberto Garza to complain about Plaintiff and asked Mr. Garza to terminate Plaintiff from his job. Plaintiff states he met with Dan McKenna, a UCD (United Citizens for Donna) member who allegedly "reiterated what was becoming apparent to Plaintiff, namely that UCD wanted him out." On October 22, 1992, Defendants Garza, Salinas, and De Leon allegedly voted to notify Plaintiff of The Donna Housing Authority's intent to terminate Plaintiff. Plaintiff requested a hearing which was granted by Aracelli Reyes by letter of October 23, 1992, to Plaintiff. Additionally, Plaintiff acknowledges that on November 9, 1992, Aracelli Reyes wrote Plaintiff to acknowledge his request for a hearing and submitted to Plaintiff a list of charges, including the charge of "ineffective management of The Donna Housing Authority complexes," that would be used at the hearing. According to Plaintiff, the hearing was conducted on December 2, 1992, and his employment was terminated. Plaintiff contends that Defendant Reyes said that Plaintiff was terminated for ineffective management, but Plaintiff believes he was fired for not supporting the United Citizens For Donna, a political group. Plaintiff alleges he never received any negative comments about his work. Finally, Plaintiff alleges that Defendant Donna Housing Authority, through Defendant Reyes, published a libelous statement when it was reported in the newspaper that Plaintiff was terminated from his job for ineffective management.

Plaintiff asserts against Defendants state pendent claims of breach of contract and libel. Plaintiff also asserts against Defendants federal constitutional claims of denial of due process under the Fourteenth Amendment, denial of liberty interest under the Fourteenth Amendment, and violation of Plaintiff's right to political association under the First and Fourteenth Amendments. Plaintiff has asserted the federal constitutional claims under The Federal Civil Rights Act, 42 U.S.C. §1983.

II.
Grounds For Dismissal

(A) The Housing Authority Of The City Of Donna, Texas, Is Not Liable

Plaintiff has named as one of the defendants in this cause, The Housing Authority Of The City Of Donna, Hidalgo County, Texas. Yet, it is clear that throughout Plaintiff's petition, Plaintiff wishes to hold The Donna Housing Authority liable for the alleged actions of Defendants Reyes, Garza, Salinas, and De Leon simply on the basis of respondeat superior. However, under 42 U.S.C. §1983, respondeat superior cannot be the basis for liability. Monell v. New York City Department Of Social Services, 436 U.S. 658 (1978). Therefore, The Housing Authority Of The City Of Donna, Hidalgo County, Texas, should be dismissed from this action.

(B) No Personal Involvement Of Reyes, Garza, Salinas and De Leon Shown

Plaintiff has not alleged any factual basis of constitutional violations against Reyes, Garza, Salinas and De Leon. Rather, it is apparent from Plaintiff's petition that Plaintiff's claims of constitutional violations rely on allegations surrounding other individuals. Plaintiff's claim against Reyes is that Reyes simply gave Plaintiff full advance notice of the hearing and that Reyes told him he was discharged for inef-

fective management. Plaintiff's claims against Garza, Salinas and De Leon are that these Defendants voted to notify him of the Donna Housing Authority's intent to terminate Plaintiff. None of these allegations, even if proven true, would implicate these individuals in a constitutional violation. Personal involvement is a prerequisite to any claim of constitutional wrong under 42 U.S.C. §1983. Harvey v. Andrist, 754 F.2d 569 (5th Cir. 1985), cert. denied, 471 U.S. 1126 (1985).

(C) Housing Authority Of The City Of Donna, Hidalgo County, Texas, Not A Proper Party Plaintiff names The Housing Authority Of The City Of Donna, Hidalgo County, Texas, as a Defendant in his First Amended Complaint. Yet, one of the elements in §1983 is that the Plaintiff show that the Defendant acted "under color of law." Adickes v. Kress, 398 U.S. 144 (1970). As a matter of law, the amended complaint does not state any actionable claims against The Housing Authority Of The City Of Donna, Hidalgo County, Texas, because it is not a governmental entity that exists separate and apart from The City Of Donna, Texas, that would susceptible to suit and service, for which reason all claims against The Housing Authority Of The City Of Donna, Hidalgo County, Texas, should be dismissed. Plaintiff has failed to allege any actionable governmental policy or custom on the part of The Donna Housing Authority that proximately caused the deprivation of any constitutional right of Plaintiff. Also, complaints against The Donna Housing Authority should be dismissed pursuant to Federal Rule Of Civil Procedure 12(b)(2) for a lack of jurisdiction over it as a person.

(D) Municipal Liability Not Established Should the Court find that The Donna Housing Authority is the equivalent of a municipal defendant that can be

held liable, Defendant asserts that Plaintiff has completely failed to allege facts that could hold a municipality liable. In Monell, supra, the Supreme Court held that a governmental entity could be found liable under §1983 **only if** the entity itself causes the constitutional violation at issue. It is only when the execution of the government's policy or custom inflicts the injury that the governmental entity may be held liable under §1983. Id. Here, Plaintiff has not established facts showing either a policy or a custom to hold a municipal defendant liable in a 1983 action. Therefore, on this alternative basis, The Housing Authority Of The City Of Donna, Hidalgo County, Texas, should be dismissed.

(E) Alleged State Pendent Claim Of Breach Of Contract Not Actionable

Plaintiff has failed to state a cause of action for breach of contract. Texas follows the employment-at-will doctrine whereby, acts in a specific contract term to the contrary, an employer is free to discharge an employee with or without notice at any time for a good reason or a bad reason or for no reason at all. Zimmerman v. H.E. Butt Grocery Co., 932 F.2d 469 (5th Cir. 1991). Therefore, to succeed on a wrongful discharge claim based on a breach of contract, Plaintiff must first prove the existence of a contract which negates the employment-at-will rule. 923 F.2d at 471.

In Plaintiff's First Amended Complaint, Plaintiff completely fails to allege anywhere in the document the existence of an employment contract between himself and The Donna Housing Authority. Plaintiff's belief that a contract exists rests on three premises, each without merit. First, Plaintiff relies on his statement in XXIV of his First Amended Petition wherein he states "in the subject employment relationship, Plaintiff was an employee of The City of Donna

through the Donna Housing Authority, his employer. Plaintiff thus was in a contractual relationship with The City of Donna and the Donna Housing Authority." Plaintiff's allegation that because he was an employee of The Donna Housing Authority, a contractual relationship existed, defies logic and reason. First, the fact that a person is an employee does not necessarily mean that a contract exists. Second, Plaintiff states in Section XLIV of his First Amended Petition that he believes that the City of Donna and the Donna Housing Authority were limited in their right to terminate him although he was "arguably an at-will employee." Plaintiff's judicial admission that he was an at-will employee negates any breach of contract claim. Last, Plaintiff makes the argument that because he was afforded a hearing to rebut the charges against him, the Donna Housing Authority acknowledges its obligation, under the personnel policy, to discharge him only for cause. Again, Plaintiff's argument defies logic. The fact that Plaintiff was afforded a hearing, does not mean that the Donna Housing Authority is admitting that Plaintiff cannot be discharged except for cause. Zimmerman, 932 F.2d at 427 ("compliance, or attempted compliance with guidelines for disciplined and discharge should not be turned against an employer as evidence that it treated the manual as a contract"). On the contrary, governmental entities generally provide their at-will employees with hearings prior to or after termination in order to afford the employees an opportunity to express any grievances. Plaintiff's speculation that the hearing recognizes a property interest in his job, is without any legal support -- statutory or otherwise--and therefore, fails to state a cause of action. Because Plaintiff has failed in his First Amended Petition to plead facts showing an employment contract, Plaintiff's state pendent claim of breach of contract should be dismissed.

(F) Plaintiff Has Failed To State A Claim Of Denial Of Due Process Plaintiff contends in his First Amended Complaint that he was denied due process. This claim is meritless for two reasons. First, Plaintiff concedes that the Donna Housing Authority provided him due process with regards to his termination. He admits he was provided in advance with notice of the hearing, provided in advance with a list of charges against him that would be discussed at a hearing, and admits that his termination was in fact the subject of a hearing that was held by the Donna Housing Authority. Due process is met when an individual is provided notice and an opportunity to respond. Soderstrung v. Town of Grand Isle, 925 F.2d 135, 138 (5th Cir. 1991). Plaintiff's real complaint is that he believes that members of the Donna Housing Authority would not define "management" and would not set a standard which would explain why he was discharged for "ineffective management." In effect, Plaintiff is complaining simply about the fact that he is an at-will employee and his belief that he was not provided detailed reasons for his discharge. Yet, as explained, in an employment at-will relationship, an employer can discharge an employee for any reason or no reason at all.

Second, to establish a claim that Plaintiff was denied due process of law in violation of the Fourteenth Amendment, Plaintiff must prove he has a protective property interest in continued employment. Wells v. Hico Independent School District, 736 F.2d 243, 251 (5th Cir. 1984), citing Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972). The question of whether a public employee has a constitutionally protected property interest in his employment is determined by reference to state law. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538 (1985). As shown, under Texas law, an employment at-will relationship exits unless the Plaintiff can allege

and prove that an employment contract existed. Plaintiff has not alleged the existence of an employment contract. Therefore, Plaintiff's claim of denial of due process is frivolous and should be dismissed.

(G) Plaintiff Has Failed To State A Claim Of Denial Of A Liberty Interest Plaintiff claims that because of his firing and because a member of The Donna Housing Authority allegedly stated that the firing was for ineffective management, Plaintiff was wrongfully deprived of his "constitutionally-protected liberty interest in his good name, repute, reputation, honor and integrity." Plaintiff's allegations fail to state a claim. To sustain this type of claim, the employee must allege that he or she was not provided a name-clearing hearing regarding termination. See Wells, 736 F.2d 256 ("Moreover, the employee must not have received a meaningful hearing to clear his name"). Yet, Plaintiff concedes that he received a hearing regarding his termination. Plaintiff's real complaint is that he believes that the Donna Housing Authority did not provide him enough details of why he was discharged. However, under Texas law, since Plaintiff was an at-will employee, he was not entitled to an explanation of reasons for his discharge. Since Plaintiff had a name-clearing hearing, his claim of denial of liberty interest is without merit and should be dismissed.

(H) Plaintiff Has Failed To State A Claim Of Discharge For Exercising First Amendment Rights Plaintiff claims in Section XLII of his First Amended Complaint that he was fired in retaliation for exercising his First Amendment right of association. To establish a First Amendment claim for discharge of exercising the right of association, Plaintiff must establish (1) that he was discharged in retaliation for his political affiliation, and (2) the

protected activity was a substantial motivating factor of his discharge. Coughlin v. Lee, 946 F.2d 1152 (5th Cir. 1991). Here, in Section XLII, Plaintiff makes the conclusory allegation that Defendants Donna Housing Authority, Reyes, Salinas, Garza, and De Leon "fired Plaintiff in retaliation for Plaintiff's non-support of the UCD faction, i.e., patronage dismissal, that is for failing to support the prevailing political group." Plaintiff's allegations fail to support this assertion. In Sections VI and VII of his amended complaint, Plaintiff states that he spoke to city council members who he believes conceded that UCD wanted him removed. Similarly, Plaintiff alleges that he spoke to a former Donna Housing Authority Commissioner, Adalberto Garza, who he believed told him essentially the same. These allegations concerning two council members' alleged statements and a former Donna Housing Authority Commissioner's alleged statements simply cannot be imputed to Defendants Reyes, Garza, De Leon, and the Donna Housing Authority since under Federal Civil Rights Act, personal involvement is required. Harvey, supra. Moreover, these allegations regarding other individuals amount to mere speculation on Plaintiff's part as to why he believed these Defendants later decided to discharge him. Mere speculation and conjecture cannot be the basis of a claim under the Federal Civil Rights Act. Streetman v. Jordan, 918 F.2d 555 (5th Cir. 1990). Therefore, Plaintiff's First Amendment claim of retaliation for exercising the right to political association should be dismissed.

(I) State Pendent Claim Of Libel Or Defamation Not Maintainable Against Defendants Under the Texas Tort Claims Act, Tex.Prac.& Rem. Code §101.057(2), a governmental unit has not waived sovereign immunity as to damage claims for intentional torts. Plaintiff's claims of libel or defamation are intentional tort claims and

thus cannot be maintained against the Donna Housing Authority. Further, these same intentional torts cannot be maintained against any of the individual defendants (Reyes, Garza, De Leon and Salinas) in their official capacities since a suit against each one of them in their official capacity is the same as a suit against the governmental entity, the Donna Housing Authority. Pickell v. Brooks, 846 S.W.2d 421 (Tex.App. -- Austin 1992, no writ). These claims are not maintainable against the individual defendants in their individual capacities either since all allegations in Plaintiff's First Amended Petition against them are with respect to actions taken only in their official capacities. Therefore, all of Plaintiff's state pendent claims of libel or defamation should be dismissed because of Defendants' sovereign immunity.

(J) In General - Indispensable Elements To State A Claim Under 42 U.S.C. § 1983 Of The Federal Civil Rights Act Against, And To Overcome The Qualified Immunity From Suite Of, Governmental Officials And Officers The United States Court of Appeals for the Fifth Circuit, in the landmark decision of Elliott v. Perez, 451 F.2d 1472, 1473 (5th Cir. 1985), announced essentially the elimination of notice pleadings so far as damage suits prosecuted under 42 U.S.C. § 1983 of The Federal Civil Rights Act are concerned and a year and a half later in Jacquez v. Procunier, 801 F.2d 789, 790-792 (5th Cir. 1986), recognized the **"heightened"** standard of pleading which is necessary to state a claim under 42 U.S.C. § 1983 of The Federal Civil Rights Act "by requiring plaintiff to plead facts with particularity before they may subject public officials to trial or the vagaries of modern pretrial discovery."

The United States Court of Appeals for the Fifth Circuit squarely placed the burden

of anticipating the qualified immunity defense on the shoulders of the plaintiff, when, in Elliott v. Perez, 451 F.2d 1472, 1473 (5th Cir. 1985), the Court stated that: **"... we require of trial judges that they demand that the plaintiff's complaint state with factual detail and particularity the basis of the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity."**

The qualified immunity defense involves a two-prong test. In Trejo v. Perez, 693 F.2d 482, 485 (5th Cir. 1982), the United States Court Of Appeals For The Fifth Circuit stated that:

> **"The Court effectively created a two level progressive inquiry:**
>
> > **(1) Was the law clearly established at the time? If the answer to this threshold question is no, the official is immune.**
> >
> > **(2) If the answer is yes, the immunity defense ordinarily should fail unless the official claims extraordinary circumstances and can prove that he neither knew or should have known that his acts invaded well-settled legal rights."**

Therefore, these cases collectively hold that for a complaint to state a valid claim against a governmental official under 42 U.S.C. § 1983 of The Federal Civil Rights Act, the plaintiff must plead in the complaint:

> (1) Facts, supported with factual detail and particularity, demonstrat-

ing the factual basis for a claim under 42 U.S.C. § 1983, as opposed to mere conclusory allegations, which are insufficient to state a claim under 42 U.S.C. §1983; and

(2) Facts, supported with factual detail and particularity, demonstrating why the defendant-official cannot successfully maintain a defense of immunity, as opposed to mere conclusory allegations relative thereto which are insufficient to state a claim under 42 U.S.C. § 1983; and

(3) Facts, with supporting factual detail and particularity, demonstrating that the defendant-official violated a specific law which was clearly established at the time.

If, but only if, the complaint satisfies those three (3) specific and conjunctive pleading burdens which are essential to a complaint surviving dismissal under Federal Rule Of Civil Procedure 12(b)(6), then the burden shifts to the defendant-official to demonstrate the existence of extraordinary circumstances by proving that he neither knew nor should have known that his acts invaded well settled legal rights.

The United States Court Of Appeals For The Fifth Circuit has made manifestly clear the meaning of the "heightened" standard of pleading applicable to 42 U.S.C. § 1983 actions: either plead with factual specificity, or the Fifth Circuit will uphold dismissal. Leatherman v. Tarrant County Narcotics Intelligence And Coordination Unit, 954 F.2d 1054 (5th Cir. 1992) reversed on other grounds 507 U.S. ____, 122 L.Ed. 2d

517, 113 S.Ct. ___(US 1993).[1] Defendant Aracelli Reyes, Silvia Garza, Jose De Leon and Dolores Salinas, are public officials entitled to raise qualified immunity as their defense. Plaintiff has failed to allege specific facts to overcome each of these Defendants' qualified immunity. Therefore, all claims against these Defendants should be dismissed.

(K) Supplemental Jurisdiction

With the dismissal of all federal claims and in the event that Plaintiff's state pendent claims are not dismissed on the merits, Defendants respectfully request that the Court exercise its discretion in dismissing the remaining state pendent claims without prejudice. The law allows the Court to dismiss state pendent claims when the Court has dismissed all claims over which it has original jurisdiction. 28 U.S.C. § 1367(c)(3).

---

[1]The United States Supreme Court did not disturb the Fifth Circuit holding for which Leatherman here is cited (i.e., factual specificity is required to plead a violation of a constitutional right and of clearly-established law in order to overcome an official's qualified immunity from suit). The Court reversed Leatherman and Palmer v. City Of San Antonio, 810 F.2d 514 (5th Cir. 1987) on the ground that notice pleadings, not factual specificity which is required to overcome the qualified immunity from suit of a governmental official or officer, are all that are required to allege an unconstitutional governmental policy or custom claim against a governmental **entity** under 42 U.S.C. § 1983 of the Federal Civil Rights Act.

III.
Conclusion

All claims should be dismissed.

WHEREFORE, PREMISES CONSIDERED, The Housing Authority Of The City Of Donna, Hidalgo County, Texas, Aracelli Reyes, Sylvia Garza, Jose De Leon and Dolores Salinas (all individually and in their official capacities as commissioners of the board of The Housing Authority Of The City Of Donna, Hidalgo County, Texas), who are five of the eight defendants, respectfully pray that all claims asserted by Roberto Lugo, who is Plaintiff, be dismissed; that Plaintiff take nothing by way of this lawsuit against the defendants; that all costs of Court be taxed to and against Plaintiff, if it is subsequently determined that he is not indigent; and that Defendants have all such other and further relief, both special and general and at law and in equity, to which they are justly entitled, under the circumstances.

Respectfully submitted,

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United States District Court Southern District of Texas
Filed May 20, 1994
MICHAEL N. MILBY, CLERK

LUDLUM & LUDLUM

By /S/
James Ludlum, Jr.

May 20, 1994

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARACELI REYES, SYLVIA GARZA,
JOSE DE LEON, AND DOLORES SALINAS,
Petitioners

v.

ROBERTO LUGO,
Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

ROBERTO LUGO	§	
	§	
V.	§	**CIVIL ACTION**
	§	**NUMBER M-93-260**
	§	
HOUSING AUTHORITY	§	
OF THE CITY OF	§	
DONNA, ET AL	§	

PLAINTIFF'S RESPONSE TO MOTION OF DEFENDANT TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT UNDER RULES 12(b)(6) and (2)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff, ROBERTO LUGO, hereinafter referred to as Plaintiff, and would respectfully show this Honorable Court as follows:

I.

In their Motion to Dismiss under Rules 12(b)(6) and (2), Defendants assert ten (10) specific grounds for dismissal, as follows:

(1) Plaintiff has not stated a claim for breach of contract;

(2) Plaintiff has not stated a claim for a violation of the right to due process under the Fourteenth Amendment;

(3) Plaintiff has not stated a claim for a violation of the right to a liberty interest under the Fourteenth Amendment;

(4) Plaintiff has not stated a claim for a violation of a First Amendment right of political association;

(5) That Defendant Housing Authority of the City of Donna, Hidalgo County, Texas, is not a proper party;

(6) Plaintiff has failed to allege facts that The Housing Authority of the City of Donna, Hidalgo County, Texas is liable for any constitutional violations;

(7) Plaintiff has failed to allege facts showing the involvement of Defendants Garza, De Leon, and Salinas showing their personal involvement;

(8) Because Plaintiff has failed to allege facts showing a constitutional violation by Defendants Reyes, Garza, De Leon, and Salinas, they are entitled to qualified immunity;

(9) Plaintiff has failed to state a claim for liable (sic) or defamation since all Defendants are entitled to sovereign immunity under Texas law with respect to those claims; and

(10) There being no federal claims to try in this Court, all state claims should thus be dismissed without prejudice.

II.

Plaintiff disputes each of the foregoing assertions made by Defendants and in support of same, shows the following.

III.

PLAINTIFF HAS NOT STATED A CLAIM FOR BREACH OF CONTRACT.

Defendants argue that Plaintiff has failed to state a cause of action for the state pendent claim of breach of contract on the basis that Plaintiff was an at-will employee. In Plaintiff's original petition, he does not specifically allege breach of contract on the part of Defendant Donna Housing Authority. Plaintiff, in his second cause of action, alleges that Defendants Esmeralda Ramirez, Adan Hernandez, and Ernest E. Allison wrongfully interfered with Plaintiff's contractual relationship with the Donna Housing Authority. Thus, any discussion as to a state pendent action for breach of contract is not appropriate insofar as Plaintiff's original petition is concerned, although this issue is raised in Plaintiff's amended complaint.

In Plaintiff's First Amended Complaint, Plaintiff alleges that Defendant Donna Housing Authority was limited in its right to terminate Plaintiff for alternative reasons, on the one hand on an implied contract theory, and alternatively, as a violation of the public policy of the State of Texas. Defendants argue that no contract existed between Plaintiff and Defendant Donna Housing Authority because (1) no contractual relationship can exist if a person is an at-will employee; (2) Plaintiff's judicial admission that he was an at-will employee precludes such a finding; and (3) adherence to a personnel policy does not mean that an employer is thus

admitting that it can terminate an employee except for just cause.

Defendants arguments must fail. As to their first argument, it is noted that Texas does recognize a cause of action for tortious interference with a contractual relationship even when the employment contract is at-will. Sterner v. Marathon Oil Co., 767 S.W.2d 686 (Tex. 1989). To establish the necessary elements for a claim of tortious interference, the plaintiff must show 1) that an employment contract existed, 2) that the defendant maliciously interfered with the contractual relationship, and (3) that there was not legal justification or excuse. Sakowitz, Inc. v. Steck, 669 S.W.2d 105 (Tex. 1984). These two holdings not only suggest, but they mandate the conclusion that a contractual relationship exists between an employer and an employee even when the employment relationship is at-will. Thus, Defendants argument that "the fact that a person is an employee does not necessarily mean that a contract exists" is without merit and must fail.

As to Defendants' second argument, it too must fail. When Plaintiff stated that he was arguably an at-will employee, Plaintiff must merely being technical as to its use of terminology. At-will refers to that employment arrangement wherein no specific time is specified as to its duration. Plaintiff was merely admitting that such was the case with respect to Plaintiff and the Donna Housing Authority.

As to its third and final argument on this point, Defendants argue that "the fact that Plaintiff was afforded a hearing does not mean that the Donna Housing Authority is admitting that Plaintiff cannot be discharged except for cause" and cite Zimmerman, 932 F. 2d at 427, in support thereof. While Plaintiff admits that the

Texas courts have consistently held that handbooks constitute no more than general guidelines, such is not the case at hand. Here, the Donna Housing Authority referred to its personnel manual for the procedures by which to terminate Plaintiff. Unlike the above line of cases, employee handbooks, accompanied by an express agreement regarding the procedures for discharge of employees, as was the case here, do create contractual rights regarding those procedures. Vallone v. Agip Petroleum Co., 705 S.W. 2d 757 (Tex. App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.) Applied to Plaintiff, the Donna Housing Authority thus had an obligation to terminate for just cause, which Plaintiff has alleged, did not exist.

IV.

PLAINTIFF HAS NOT STATED A CLAIM FOR A VIOLATION OF THE RIGHT TO DUE PROCESS UNDER THE 14TH AMENDMENT.

Defendants argue that Plaintiff's due process rights could not have been deprived because of Plaintiff's failure to allege the existence of a protective property interest. Although clarified in Plaintiff's amended petition, Plaintiff has made such an allegation and such as property interest was in fact acknowledged by Defendants. In paragraphs XXXV through XXXVIII, Plaintiff alleges that he has, as a public employee, a protected property interest in continued employment. Defendants acknowledged this fact that Plaintiff had a protected property interest in continued employment by offering a hearing, albeit a superficial one, to Plaintiff on or about October 22, 1992, and which was "held", in the loosest sense of the word, on or about December 2, 1992. The sole reason Defendants proceeded in this manner was to comply with the mandate set forth in Cleveland Board of Education v. Leudermill, id. at 541.

V.

PLAINTIFF HAS NOT STATED A CLAIM FOR A VIOLATION OF THE RIGHT TO A LIBERTY INTEREST UNDER THE 14TH AMENDMENT.

Defendants next urge that Plaintiff's allegations fail to state a claim for deprivation of his liberty interest. Defendants cite Wells v. Hico Independent School District 736 F. 2d 243, 256 (5th Cir. 1984) for the proposition that a plaintiff must allege that he or she was not provided a name-clearing hearing regarding termination. Defendants reliance on Wells is misplaced in the case at hand. The liberty interest which Plaintiff alleges he was deprived of relates to his good name, reputation, honor, and integrity. In Campos v. Guillot, 743 F. 2d 1123 (5th Cir. 1984), the court set forth the proposition that the establishment of a liberty interest occurs upon the employees demonstration that his "government employer has brought false charges against him that might seriously damage his standing associations in his community", or that impose a "stigma or other disability" that forecloses "freedom to take advantage of other employment opportunities". id at 1125.

Though clarified in Plaintiff's amended complaint, Plaintiff has so alleged. In his fifth cause of action, by repeating the allegations contained in paragraphs XVII through XXIII, Plaintiff has effected the allegation that Defendants falsely released to the public on or about December 2, 1992 the statement that Plaintiff was terminated for ineffective management. As stated in paragraph XX of Plaintiff's original petition, Defendants refused to define the term "management", despite the fact that the Texas Housing Association adequately and formally does so. The resulting (false) statement made by Defendants to the public that Plaintiff was terminated for ineffec-

tive managed satisfies the standard set forth in Campos v. Guillot, namely that such a false statement "might seriously damage his (plaintiff's) standing and association in the community". id.

In any event, the standard set forth in Wells supra has been satisfied by Plaintiff. In paragraph XIII., Plaintiff alleges that his termination was **substantively** effective on October 22, 1992, which was before the December 2, 1992 hearing. Defendant Reyes confirms this fact by writing to Plaintiff, "If you elect to have a hearing, your termination will not be effective until the conclusion of that hearing." These are the words which do support the empty statements made by Defendants that Plaintiff received a hearing regarding his termination. In any event, by Defendants failing to set a standard by which Plaintiff was to be measured, as has been alleged by Plaintiff, Defendants effectively denied Plaintiff a meaningful opportunity to clear his name.

V.

PLAINTIFF HAS NOT STATED A CLAIM FOR A VIOLATION OF A FIRST AMENDMENT RIGHT OF POLITICAL ASSOCIATION.

Defendants next urge that Plaintiff's sixth cause of action should be dismissed on the basis that "mere speculation and conjecture cannot be the basis of a claim under the Federal Civil Rights Act", citing Streetman v. Jordon, 918 F. 2d 555 (5th Cir. 1990). Plaintiff is not relying solely on speculation and conjecture. Plaintiff, on numerous instances throughout his complaint, alleges facts, not speculations or conjecture, that would establish that Plaintiff was discharged in retaliation for his political affiliation, and that the protected activity was a substantial motivating factor of his discharge.

VI.

DEFENDANT HOUSING AUTHORITY OF THE CITY OF DONNA, HIDALGO COUNTY, TEXAS IS NOT A PROPER PARTY.

Defendants urge that all claims against the Donna Housing Authority should be dismissed because it is not a governmental entity that exists separate and apart from the City of Donna, Texas and because Plaintiff has failed to allege any actionable governmental policy or custom on the part of the Donna Housing Authority that proximately caused the deprivation of any constitutional right of Plaintiff. As to this latter contention, Plaintiff has so alleged governmental policy or custom on the part of the Donna Housing Authority that deprived him of his constitutional rights. In paragraph XLII. o his original complaint, Plaintiff alleges that "Defendants' actions resulted from and were taken pursuant to official employment policy or custom of Defendant Donna Housing Authority and/or its parent, the City of Donna. As to Defendant's former contention, Plaintiff has factually alleged that the Donna Housing Authority is a subsidiary entity of Defendant City of Donna, and thus accountable on its own violation.

VII.

PLAINTIFF HAS FAILED TO ALLEGE FACTS THAT THE DONNA HOUSING AUTHORITY IS LIABLE FOR ANY CONSTITUTIONAL VIOLATIONS.

In Section II, paragraph (A), Defendants argue that the Housing Authority of the City of Donna, Texas cannot be liable for the actions of Defendants Reyes, Garza, Salinas, and De Leon on the basis of respondent superior. In support of such, Defendants cite Monell v. New York City Department of Social Services, 436 U.S. 658 (1978). Defendants reliance on Monell is

misplaced however, because in the case at hand, liability on the Donna Housing Authority is not being alleged on the basis of respondeat superior. Rather, as alleged in paragraph XXXV of Plaintiff's original petition, the Donna Housing Authority, in addition to Defendants Araceli Reyes, Sylvia Garza, Delores Salinas, and Jose De Leon, is alleged to have at all times acted under color of state and municipal law in its acting. While Monell does stand for the notion that a local government will not be held liable under 42 U.S.C. § 1983 solely because it employs a tortfeasor, a public body below the state level can be bound by individual tortfeasors. Liability under 42 U.S.C. § 1983 will attach to such a public body when the individual tortfeasor caused the harm pursuant to the laws, policy, custom or practice of that public body. Owen v. City of Independence, MO, 45 U.S. 622 (1980).

In the case at hand, Plaintiff will respectfully show unto the court that the City of Donna and the Donna Housing Authority had a policy, custom, and practice of committing the wrongs Plaintiff complains of.

VIII.

PLAINTIFF HAS FAILED TO ALLEGE FACTS SHOWING THE INVOLVEMENT OF DEFENDANTS REYES, GARZA, SALINAS, AND DE LEON SHOWING THEIR PERSONAL INVOLVEMENT.

Defendants state that no personal involvement has been alleged against Defendants Garza, Salinas, and De Leon. Defendants urge that the consequence of this is that there can be no claim of constitutional wrong under 42 U.S.C. § 1983. Defendants cite Harvey v. Audvist, 754 F. 2d 569 (5th Cir. 1985), cert. denied, 471 U.S. 1126 (1985) as support for the proposition that

personal involvement is that sole prerequisite for liability under 42 U.S.C. § 1983 to attach. However, Harvey also holds that in the absence of personal involvement on the part of the defendants alleged to have violated one's constitutional rights, it is sufficient to show a causal connection between an actor/defendants' conduct and the constitutional violation sought to be redressed.

Plaintiff has alleged that this latter situation occurred. In paragraph XXXXV of his original petition, Plaintiff alleges such a causal connection by alleging that upon being sworn in as board members, the result was Plaintiff's substantive termination.

IX.

MUNICIPAL LIABILITY NOT ESTABLISHED.

Plaintiff refers the court to paragraph VII. herein as his response to Defendants contention that municipal liability has not been established.

X.

DEFENDANTS REYES, GARZA, SALINAS, AND DE LEON ENTITLED TO QUALIFIED IMMUNITY.

Defendants urge dismissal on the basis that Plaintiff has failed to allege specific facts to overcome Defendants' possible defense of qualified immunity. Although Plaintiff has, in his amended petition, clarified his factual allegations, Plaintiff believes that he has satisfied the heightened standard set by Leatherman v. tarrant County Narcotics Intelligence and Coordination Unit, 954 F. 2d 1054 (5th Cir. 1992), rev'd on other grounds at 507 U.S. _____ (1993).

To establish the affirmative defense of qualified immunity a Defendant must show that he was performing a discretionary function in good faith within the scope of his authority. Travis v. City of Mesquite, 830 S.W. 2d 94 (Tex. 1992). Plaintiff's original petition is replete with charges that Defendants acted willfully and maliciously, and thus sans objective good faith, in the manner in which they terminated Plaintiff. These allegations, taken as a whole, are not of the "boilerplate" variety that upset the court in Leatherman, supra. Plaintiff is of the belief that he has adequately stated "with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity." Elliott v. Perez, 751 F. 2d 1472, 1473 (5th Cir. 1985).

XI.

PLAINTIFF HAS FAILED TO STATE A CLAIM FOR LIBEL OR DEFAMATION SINCE ALL DEFENDANTS ARE ENTITLED TO SOVEREIGN IMMUNITY UNDER TEXAS LAW.

Defendants argue that they cannot be liable, either as an entity or as individual members acting in their official capacities, because neither of them has waived sovereign immunity as for the damage claims related to libel and defamation, which are intentional torts. Plaintiff's contention is that the Donna Housing Authority is vicariously liable for the acts of its agents, the Donna Housing Authority board members. The Texas Tort Claims Act expressly provides that it does not affect individual immunity. Texas Civil Practice and Remedies Code, §101.026. In order for liability not to attach to the Donna Housing Authority, discretionary immunity must be affirmatively plead. To do so successfully, the defendant (1) must have taken his actions in good faith; (2) must

have acted within the course and scope of his authority; and (3) must have been performing a discretionary function. In the case at hand, the first element has been alleged as being amiss. Plaintiff has repeated alleged in both his original petition and in his amended complaint that the actions undertaken by Defendants was done so for political reasons, and sans objective good faith.

Defendants further allege that Plaintiff's claim of defamation must fail as against the individual defendants because they are alleged to have been acting in their official capacities. This must fail as Plaintiff has complained against these individual defendants both in their individual and in their official capacities.

XII.

WHEREFORE, PREMISES CONSIDERED, Plaintiff, ROBERTO LUGO, prays that Defendants' Motion to Dismiss Plaintiff's First Amended Complaint under Rule 12(b)(6) and 12(b)(2) be denied.

Respectfully submitted,

Rolando Garcia
Attorney and Counselor at Law
131 South 8th Street, Suite 10
Donna, Texas 78537
Telephone (210) 464-0171
Facsimile (210) 464-0805

BY: /S/
Rolando Garcia
Federal ID No. 15870

ATTORNEY FOR PLAINTIFF.

CERTIFICATE OF SERVICE

Contemporaneously in point of date with the transmittal for filing of one originally-signed and holepunched copy of the foregoing to the District Clerk in McAllen, Texas one true copy thereof was transmitted via facsimile and through the mails of the United States of America by Certified Mail-Return Receipt Requested-Number:

(1) P 857 810 380 to Anthony G. Brocato, Jr., Ludlum & Ludlum, Second Floor, The Enterprise Plaza, Wells Branch Parkway, 13915 Burnet Road, Austin, Texas, 78728; and

(2) P 857 810 381 to Ms. Lisa Mount, Willette & Aguilar, International Plaza, 3505 Boca Chica Blvd., Suite 460, Brownsville, Texas 78521.

ROLANDO GARCIA
ATTORNEY AND COUNSELOR AT LAW

/S/
Rolando Garcia

July 5, 1994

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARACELI REYES, SYLVIA GARZA,
JOSE DE LEON, AND DOLORES SALINAS,
Petitioners

v.

ROBERTO LUGO,
Respondent

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX K

APPEAL

U.S. District Court
TXS - Southern District of Texas (McAllen)

CIVIL DOCKET FOR CASE #: 93-CV-260

Lugo v. Housing Authority, et al
Filed: 11/29/93
Assigned to: Judge Ricardo H. Hinojosa
Jury Demand: Defendant
Demand: $0,000
Nature of Suit: 440
Lead Docket:None
Jurisdiction:Federal Question
Dkt # in 206th Dr Ct
Hidalgo : is C-4806-93-D

Cause: 28:1441 Notice of Removal

ROBERTO LUGO
plaintiff

Rolando Garcia
[COR LD NTC]
Attorney at Law
131 S 8th St
Ste 10
Donna, TX 78537
210-464-0171

v.

THE HOUSING AUTHORITY OF THE CITY OF DONNA, HIDALGO COUNTY, TEXAS
defendant

James Ludlum, Jr
[COR LD NTC]
Ludlum & Ludlum
13915 Burnet Rd
2nd Floor
Austin, TX 78728
512-255-4000

Anthony G Brocato
[COR LD NTC]
Ludlum & Ludlum
13915 Burnet Rd
Ste 200
Austin, TX 78728
512-255-4000

ARACELIA REYES, Individually
and in her Official Capacity
as Commissioner of the Board
of the Housing Authority of
the City of Donna, Hidalgo
County, Texas
defendant

James Ludlum, Jr
(See above)
[COR LD NTC]

Anthony G Brocato
(See above)
[COR LD NTC]

SYLVIA GARZA, Individually,

James Ludlum, Jr

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and in her Official Capacity (See above)
as Commissioner of the Board [COR LD NTC]
of the Housing Authority of
the City of Donna, Hidalgo
County, Texas
defendant

Anthony G. Brocato
(See above)
[COR LD NTC]

JOSE NMI DE LEON, Individually,
and in his Official Capacity
as Commissioner of the Board
of the Housing Authority of
the City of Donna, Hidalgo
County, Texas
defendant

James Ludlum, Jr
(See above)
[COR LD NTC]

Anthony G Brocato
(See above)
[COR LD NTC]

DOLORES SALINAS, Individually,
and in her Official Capacity
as Commissioner of the Board
of the Housing Authority of
the City of Donna, Hidalgo
County, Texas
defendant

James Ludlum, Jr
(See above)
[COR LD NTC]

Anthony G Brocato
(See above)
[COR LD NTC]

ERNEST E ALLISON, Individually,
and in his Capacity as Interim
City Manager of the City of
Donna, Hidalgo County, Texas
defendant

J Arnold Aguilar
[COR LD NTC]
Willette & James
International Plaza, Suite 460
3505 Boca Chica Blvd.
Brownsville, TX 78521
512-541-1846

Lisa M Mount
[COR LD NTC]
Willette & Aguilar
3505 Boca Chica Blvd.
Ste 460
Brownsville, TX 78521
512-541-1846

ESMERALDA RAMIREZ,
Individually, and in her
Capacity as Council Member of
the City of Donna, Hidalgo
County, Texas
defendant

J Arnold Aguilar
(See above)
[COR LD NTC]

Lisa M Mount
(See above)
[COR LD NTC]

ADAN HERNANDEZ, Individually,
and in Capacity as Council

J Arnold Aguilar
(See above)

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Member of the City of Donna
Hidalgo County, Texas
defendant

[COR LD NTC]

Lisa M Mount
(See above)
[COR LD NTC]

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11/29/93	1	NOTICE OF REMOVAL; filed by The Housing Authority of Donna, Hidalgo County, Texas, Arceli Reyes, Sylvia Garza, Jose De Leon, Dolores Salinas. FILING FEE $ 120.00 RECEIPT # 703466 (nad)
11/29/93	2	ORDER set initial pretrial conference for 2:30 2/3/94 before Judge Ricardo H. Hinojosa, entered; Parties notified. (signed by Judge Ricardo H. Hinojosa) (Joint Discovery/Case Management Plan form attached to order) (nad)
12/6/93	3	MOTION to dismiss by Housing Authority of Aracelia Reyes, Sylvia Garza, Jose NMI De Leon, Dolores Salinas, Motion Docket Date 12/26/93 [3-1] motion , filed. (nad) [Entry date 12/07/93]
12/6/93	4	BRIEF by Housing Authority of, Aracelia Reyes, Sylvia Garza, Jose NMI De Leon, Dolores Salinas in support of [3-1] motion to dismiss , filed. (nad) [Entry date 12/07/93]
1/5/94	5	MOTION for oral hearing on [3-1] motion to dismiss by Roberto Lugo, Motion Docket Date 1/25/94 [5-1] motion , filed. (nad) [Entry date

		01/06/940] [Edit date 02/10/94]
1/19/94	6	MOTION to dismiss for failure to state a claim upon which relief can be granted, and for more definite statement, and to stay discovery by Ernest E Allison, Esmeralda Ramirez, Adan Hernandez, Housing Authority of the City of Donna, Hidalgo County, TX, Motion Docket Date 2/8/94 [6-1] motion, 2/8/94 [6-2] motion, 2/8/94 [6-3] motion , filed. (nad) [Entry date 01/21/94]
1/21/94	7	JOINT DISCOVERY/Case Management Plant by Roberto Lugo, Housing Authority of, Aracelia Reyes, Sylvia Garza, Hose NMI De Leon, Dolores Salinas, Ernest E Allison, Esmeralda Ramirez, Adan Hernandez , filed. (nad)
2/3/94	8	Minute entry: INITIAL PRETRIAL AND SCHEDULING CONFERENCE held before Judge Ricardo H. Hinojosa; Response to motion to reset to 3/4/94 for [6-1] motion to dismiss for failure to state a claim upon which relief can be granted ; Motion hearing set for 10:00 A.M. 4/8/94 for [6-1] motion to dismiss for failure to state a claim upon which relief can be granted Ct Reporter: ERO/I Soto; Ct Clk; S Martinez. Appearances: Rolando Gar-

		cia f/pltf; Arnold Aguilar, Anthony G. Brocato f/dfts. Case is called on the docket. All present. No response to defendant's motion to dismiss has been filed. Mr. Garcia to respond by 3/4/94. (nad) [Entry date 02/08/94] [Edit date 02/10/94]
3/4/94	9	(OPPOSED) MOTION for leave to file response to defendant's [6-1] motion to dismiss under rules 12(6) (6) and (7) by Roberto Lugo, Motion Docket Date 3/24/94 [9-1] motion , filed. (nad)

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3/4/94	10	MOTION for oral hearing on [10-1] motion by Roberto Lugo, Motion Docket Date 3/24/94 [10-1] motion , filed. (nad)
3/4/94	--	**Terminated document [10-1] motion for oral hearing on [6-1] motion to dismiss as moot (nad)
3/7/94	11	ORDER striking plaintiff's [9-1] motion for leave to file response to defendant's [6-1] motion to dismiss under rules 12(6) (6) and (7) , entered; Parties notified. (signed by Judge Ricardo H. Hinojosa)

		(no statement of opposition or non opposition; no statement re conference with all opposing counsel) (nad) [Entry date 03/08/94]
4/8/94	12	(OPPOSED) MOTION for continuance of motion hearing set for 4/8/94 by Roberto Lugo, Motion Docket Date Forthwith [12-1] motion , filed. (nad)
4/8/94	13	(OPPOSED) MOTION for leave to file plaintiff's response to defendant's [3-1] motion to dismiss under Rules 12(b)(6) and (7) by Roberto Lugo, Motion Docket Date 4/28/94 [13-1] motion , filed. (nad)
4/8/94	14	(UNOPPOSED) MOTION for leave to file first amended petition by Roberto Lugo, Motion Docket Date Forthwith [14-1] motion , filed. (nad)
4/8/94	15	(OPPOSED) MOTION for leave to file plaintiff's response to defendants' [6-1] motion to dismiss for failure to state a claim upon which relief can be granted by Roberto Lugo, Motion Docket Date 4/28/94 [15-1] motion , filed. (nad)
4/8/94	16	ORDER granting plaintiff's [12-1] motion for continuance of motion hearing set for 4/8/94. Motion hearing reset for 2:30 5/6/94 for [6-1] motion to dismiss for failure to state a claim

upon which relief can be granted , entered; Parties notified. (Judge Ricardo H. Hinojosa) (nad) [Entry date 04/13/94]

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5/6/94	17	Minute entry: MOTION HEARING held before Judge Ricardo H Hinojosa; granting plaintiff's [14-1] motion for leave to file first amended petition ; denying without prejudice Allison, Ramirez and Hernandez's [6-1] motion to dismiss granted, [6-2] motion for more definite statement and [6-3] motion to stay discovery ; denying without prejudice Housing Authority, Reyes, Garza, De Leon and Salinas' [3-1] motion to dismiss ; mooting plaintiff's [15-1] motion for leave to file plaintiff's response to defendants' [6-1] motion to dismiss ; mooting plaintiff's [13-1] motion for leave to file plaintiff's response to defendant's [3-1] motion to dismiss. SET hearing 2:30 7/11/94. Ct Reporter: ERO/I Soto; Ct Clk: S Martinez. Appearance: Roland Garcia f/pltf; Catherine Klye, Lisa Mount f/dfts.

		Case is called on the docket. Court GRANTS Ms. Kyle's oral motion to appear in place of Arnold Aguilar for this hearing. Court denies all motions to dismiss without prejudice to refiling addressing the present complaint. Court sets a hearing on the motions (nad) [Entry date 05/11/94]
5/6/94	18	ORDER granting plaintiff's [14-1] motion for leave to file first amended petition , entered; Parties notified. (signed by Judge Ricardo H. Hinojosa) (nad) [Entry date 05/11/94]
5/6/94	19	FIRST AMENDED COMPLAINT by Roberto Lugo , (Answer due 5/16/94 for Adan Hernandez, for Esmeralda Ramirez, for Ernest E for Dolores Salinas, for Jose NMI De Leon, for Sylvia For Aracelia Reyes, for Housing Authority of) amending , filed. (nad) [Entry date 05/11/94]
5/20/94	20	MOTION to dismiss plaintiff's first amended complaint under Rule 12(b)(6) and 12(b)(2) by Housing Authority of the City of Donna, Aracelia Reyes, Sylvia Garza, Hose NMI De Leon, Dolores Salinas, Motion Docket Date 6/9/94 [20-1] motion , filed. (nad)

5/20/94	21	BRIEF by Housing Authority of the City of Donna, Aracelia Reyes, Sylvia Garza, Hose NMI De Leon, Dolores Salinas in support of [20-1] motion to dismiss , filed. (nad)
7/6/94	22	(UNOPPOSED) MOTION for leave to file plaintiff's response to defendants' [20-1] motion to dismiss plaintiff's first amended complaint under Rules 12(b)(6) and (7) by plaintiff Roberto Lugo, Motion Docket Date Forthwith [22-1] motion , filed. (nad)
7/8/94	23	(UNOPPOSED) MOTION for leave to file unopposed motion to stay discovy by defendants Ernest E Allison, Esmeralda Ramirez, Adan Hernandez, Motion Docket Date Forthwith [23-1] motion , filed. (nad) [Entry date 07/11/94]

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7/8/94	24	MOTION to dismiss for failure to state a claim upon which relief can be granted and for more definite statement, and unopposed motion to stay discovery by defendants Ernest E Allison, Esmeralda Ramirez, Adan Hernandez, Motion

		Docket Date 7/28/94 [24-1] motion, 7/28/94 [24-2] motion, Forthwith [24-3] motion , filed, (nad) [Entry date 07/11/94]
7/8/94	25	ORDER granting plaintiff's [22-1] motion for leave to file response to defendants' [20-1] motion to dismiss plaintiff's first amended complaint under Rules 12(b)(6) and (7) , entered; Parties notified. (singed by Judge Ricardo H. Hinojosa) (nad) [Entry date 07/11/94]
7/8/94	26	RESPONSE by plaintiff Roberto Lugo to defendants [20-1] motion to dismiss plaintiff's first amended complaint under Rules 12(b)(6) and (2) , filed. (nad) [Entry date 07/11/94]
7/11/94	27	Minute entry: MOTION HEARING held before Judge Ricardo H. Hinojosa; granting defendants' [24-3] motion to stay discovery with exception to matters involving qualified immunity, pending ruling on the defendants' motion to dismiss ; mooting [23-1] motion for leave to file unopposed motion to stay discovery. Motion hearing set for 2:30 9/1/94 for [24-1] motion to dismiss for failure to state a claim upon which relief can be granted, for [24-2] for more definite statement, [20-1] motion to dismiss. Ct Re-

		porter: ERO I/Soto; Ct Clk: L Cervantes. Appearances: Rolando Garcia f/pltf; Anthony G. Brocato Lisa Mount f/dfts. Counsel announce presence. Lisa Mount allowed to appear for Arnold Aguilar. Court will continue with hearing 9/1/94. (nad) [Entry date 07/29/94] [Edit date 08/19/94]
7/18/94	--	RECEIVED proposed order concerning defendants' motion to dismiss plaintiff's first amended complaint with regard to hearing held 7/11/94. (nad) [Entry date 07/19/94]
7/28/94	28	RESPONSE by plaintiff Roberto Lugo to defendants' {24-1] motion to dismiss for failure to state a claim upon which relief can be granted , filed. (nad) [Entry date 07/29/94]
7/28/94	--	VOLUME 1 CONSISTS OF PLEADINGS 1 THRU 28 (nad)
8/30/94	29	REPLY by defendants Ernest E Allison, Esmeralda Ramirez, Adan Hernandez, Housing Authority of the City of Donna to plaintiff's [28-1] response to defendants' [24-1] motion to dismiss for failure to state a claim upon which relief can be granted , filed (nad)

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9/1/94	30	Minute entry: MOTION HEARING held before Judge Ricardo H. Hinojosa: Motion hearing SET for 4:00 10/7/94 for [24-1] motion to dismiss for failure to state a claim upon which relief can be granted, for motion for more definite statement, and for [20-1] motion to dismiss, SET supplemental briefs due for 9/30/94. Ct Reporter: ERO/I Soto; Ct Clk: S Martinez. Appearances: Rolando Garcia f/pltf; Anthony G. Brocato, Lisa Mount f/dfts. Case is called ont he docket. Lisa Mount orally requests leave to appear for Arnold Aguilar. Court grants. Arguments of counsel. Court will visit with the parties In-Chambers regarding the status of any settlement discussions. After an In-Chambers conference, the court states it will issue its ruling on the motions to dismiss at a hearing on Friday, 10/7/94. If parties wish to file any supplemental briefing this is to be done by 9/30/94. (nad) [Entry date 09/14/94]
9/30/94	31	JOINT STATUS REPORT on case by defendants Adan Hernandez, Esmeralda Ramirez, Ernest Allison,

		Dolores Salinas, Jose NMI De Leon, Sylvia Garza, Aracelia Reyes, Housing Authority of Donna, and plaintiff Roberto Lugo informing the Court that at this time, all issues remain pending and the parties have not been able to resolve or dispose of any issues , filed. (nad) [Entry date 10/03/94]
10/4/94	32	STATUS REPORT by plaintiff Roberto Lugo informing the Court that no agreements have been made as to issues or as to the disposition of this matter due to the fact that defendants' clients deem it premature to so do at this stage in litigation , filed. (nad) [Entry date 10/05/94]
10/7/94	33	Minute entry: MOTION HEARING held before Judge Ricardo H. Hinojosa; denying defendants' [24-1] motion to dismiss, [24-2] motion for more definite statement and [20-1] motion to dismiss without prejudice to refiling as a motion for summary judgment. Cr Reporter: ERO /I Soto; Ct Clk: S Martinez. Appearances; Rolando Garcia f/pltf; Anthony G. Brocato, Lisa Mount f/dfts. Case is called on the docket. Arugments of counsel. Court makes findings. Court will issue a docket control order (4 mos.) (nad) [Entry date 10/21/94]

10/12/94	34	RULE 16 FRCP SCHEDULING ORDER SET scheduling order deadlines: Discovery cut-off 2/6/95 ; Deadline for filing motions for extension of time to complete discovery 1/6/95; Deadline for filing non-dispositive motions , Deadline for filing all dispositive motion 2/16/95 ; joining of parties, amended pleadings 2/16/95 ; Pretrial order to be submitted on or before 3/2/95 ; SET pretrial conference for 2:30 3/9/95 before Judge Ricardo H. Hinojosa , entered; Parties notified. (signed by Judge Ricardo H. Hinojosa) (nad) [Entry date 10/21/94]

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10/17/94	35	ANSWER to First Amended Complaint by defendants Ernest E Allison, Esmeralda Ramirez, Adan Hernandez , filed. (nad) [Entry date 10/21/94]
10/21/94	36	ANSWER to First Amended Complaint by defendants Housing Authority of the City of Donna, Aracelia Reyes, Sylvia Garza, Jose NMI De Leon, Dolores Salinas , filed. (nad) [Entry date 10/24/94]

10/28/94	37	NOTICE OF APPEAL of 10/7/94 oral order denying defendants' [24-1] motion to dismiss by defendants Aracelia Reyes, Sylvia Garza, Jose NMI De Leon, Dolores Salinas in their official capacities as commissioners of the board of the Hosing Authority of the City of Donna, Hidalgo County, Texas, filed. Fee Status: paid; Receipt #: 704656. Appeal record due on 11/12/94 (nad)
10/31-94	--	Notice of appeal and certified copy of docket transmitted to USCA: [37-1] appeal (nad)
12/8/94	38	TRANSCRIPT OF PROCEEDINGS of motion to dismiss hearing for date of 9/1/94 before Judge Ricardo H. Hinojosa , filed. (Court Rptr: ERO/I Soto) (nad) [Entry date 12/09/94]
12/8/94	39	TRANSCRIPT OF PROCEEDINGS of motion to dismiss hearing for dates of 10/7/94 before Judge Ricardo H. Hinojosa , filed. (Court Rptr: ERO/I Soto) (nad) [Entry date 12/09/94]
12/13/94	--	TRANSMITTAL letter to USCA informing them that the record is complete, but being held in the District Court because case is set for a pretrial conference on 3/9/95. (nad)

12/23/94	40	JUDGMENT OF USCA (certified copy) 12/19/94 issued as mandate on 12/19/94 dismissing [37-1] appeal for want of prosecution for failure of appellants to order the transcript within the time fixed by the rules, filed. (nad)
12/23/94	--	**Terminated pending appeal terminating [37-1] appeal Circuit no. 94-60743 (nad)
1/25/95	41	ORDER from U.S.C.A. reinstating [37-1] appeal as to defendants Aracelia Reyes, Sylvia Garza, Jose NMI De Leon, Dolores Salinas, filed. (nad) [Entry date 02/03/95]
2/2/95	42	MOTION for extension of discovery deadlines by plaintiff Roberto Lugo, and defendants Ernest E Allison, Esmeralda Ramirez, Adan Hernandez, Motion Docket Date 2/22/95 [42-1] motion , filed. (nad) [Entry date 02/03/95]
2/6/95	43	ORDER striking [42-1] motion for extension of discovry deadlines , entered; Parties notified, (signed by Judge Ricardo H. Hinojosa) (no statement of conference between all counsel of record; and signature of Rolando Garcia not original) (nad) [Entry date 02/07/95]

Docket as of February 7, 1995 12:55 pm.
NON-PUBLIC

INTERNAL USE ONLY:
Proceedings include all events.
7:93cv260 Lugo v. Housing Authority, et al
APPEAL

2/13/95	44	(UNOPPOSED) MOTION for extension of discovery deadlines by defendants Ernest E Allison, Esmeralda Ramirez, Adan Hernandez, Motion Docket Date Forthwith [44-1] motion , filed. (nad) [Entry date 02/14/95]
2/16/95	45	(UNOPPOSED) MOTION for leave to file amend answer by defendants Housing Authority of Donna, Aracelia Reyes, Sylvia Garza, Jose NMI De Leon, Dolores Salinas, Motion Docket Date Forthwith [45-1] motion , (nad)
2/24/95	46	ORDER granting defendant's [45-1] motion for leave to file amended answer , entered; Parties notified. (signed by Judge Ricardo H. Hinojosa) (nad) [Entry date 02/28/95]
2/24/95	47	AMENDED ANSWER to First Amended Complaint by defendants Housing Authority of the city of Donna, Aracelia Reyes, Sylvia Garza, Hose NMI De Leon, Dolores Salinas : amends [36-1] answer , filed. (nad) [Entry date 02/28/95]
2/24/95	48	ORDER EXTENDING TIME FOR COMPLETION OF DISCOVERY

		granting defendants' [44-1] motion for extension f discovvoery deadlines RESET scheduling order deadlines; discovery cutoff 4/6/95 ; Pretrial order to be submitted on or before 5/21/95 ; Deadline for filing all dispositive motions 4/17/95; Deadline for filing non-dispositive motions 4/17/95; joining of parties, amended pleadings 4/17/95 ; RESET pretrial conference for 2:30 6/7/95 before Judge Ricardo H. Hinojosa , entered; Parties notified. (signed by Judge Ricardo H. Hinojosa) (nad) [Entry date 02/28/95]
3/21/95	--	Certified and transmitted record on appeal consisting of 2 volumes to U.S. Court of Appeals: [37-1] appeal; . No. 94-60743 Parties ntfd. (Note: A duplicate record retained (lc)

Docket as of March 21, 1995 8:53 am
NON-PUBLIC

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARACELI REYES, SYLVIA GARZA,
JOSE DE LEON, AND DOLORES SALINAS,
Petitioners

v.

ROBERTO LUGO,
Respondent

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

ROBERTO LUGO	§	
	§	
V.	§	**CIVIL ACTION**
	§	**NUMBER M-93-260**
	§	
HOUSING AUTHORITY	§	
OF THE CITY OF	§	
DONNA, ET AL	§	

NOTICE OF DONNA HOUSING AUTHORITY DEFENDANTS OF PRE-TRIAL INTERLOCUTORY APPEAL TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT FROM THE ORDER (ANNOUNCED OCTOBER 7, 1994, AND ENTERED ON THE DOCKET OCTOBER 21, 1994) OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS (MCALLEN) DENYING THEIR MOTION TO DISMISS

TO THE HONORABLE UNITED STATES DISTRICT COURT AND CLERK:

Araceli Reyes, Sylvia Garza, Jose De Leon and Dolores Salinas (all individually and in their official capacities as commissioners of the Board of the Housing Authority of the City of Donna, Hidalgo County, Texas), who are four of the Defendants in this cause, do now hereby respectfully file and serve their Notice of Donna Housing Authority Defendants Of Pre-Trial Interlocutory Appeal To The United States Court of Appeals, Fifth Circuit From The Order (Announced October 7, 1994, and Entered On The Docket October 21, 1994) Of The United States District Court For The Southern District Of Texas (McAllen) Denying Their Motion to Dismiss Plaintiff's First Amended Complaint under Rule 12(b)(6) and Rule 12(b)(2), in which these Defendants asserted their qualified immunity from suit altogether and on the basis that each of them is

entitled to this pre-trial interlocutory appeal as a matter of right. Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); Jasquez v. Procunier, 801 F.2d 789 (5th Cir. 1986); and Stevens v. Corbell, 798 F.2d 120, 121 (5th Cir. 1986).

Respectfully submitted,

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Attorneys and Counsel of Record for Araceli Reyes, Sylvia Garza, Jose De Leon and Dolores Salinas (all individually and in their official capacities as commissioners of the Board of The Housing Authority Of The City Of Donna, Hidalgo County, Texas), Defendants

By /S/
James Ludlum, Jr.
Attorney-In-Charge
12669000
Anthony G. Brocato, Jr.
Of Counsel
03039001

CERTIFICATE OF SERVICE

Contemporaneously in point of date with the transmittal for filing of two originally-signed and holepunched copies of the foregoing and appended pleading to the District Clerk in McAllen, Texas, one true copy thereof was transmitted through the mails of the United States of America via Certified Mail-Return Receipt Requested-Number:

(1) P 157 652 810 to Rolando Garcia, Attorney and Counselor at Law, 131 South Eighth Street, Suite 10, Donna, Texas 78537, who is Attorney and Counsel of Record for Plaintiff; and

(2) P 157 653 042 to Mr. J. Arnold Aguilar, Willette & James, International Plaza, 3505 Boca Chica Blvd., Suite 460, Brownsville, Texas 78521, who are attorneys and counsel of record for City of Donna Defendants.

United States District Court Southern District of Texas
FILED OCT 28 1994
Michael N. Milby, Clerk

LUDLUM & LUDLUM

By /S/
James Ludlum, Jr.

October 27, 1994

Supreme Court, U.S.
FILED
FEB 26 1996
CLERK

No. 95-1041

In The

Supreme Court of the United States

October Term, 1995

ARACELI REYES, SYLVIA GARZA, JOSE DE LEON, AND DOLORES SALINAS,

Petitioners,

vs.

ROBERTO LUGO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ROLANDO GARCIA
Counsel of Record
Attorney for Respondent
131 South 8th Street
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8374
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTION PRESENTED

Whether in a 42 U.S.C. §1983 suit against public officials in their private or individual capacity, the Fifth Circuit has abolished the heightened pleading standard.

PARTIES TO THE PROCEEDING

(Respondent is not dissatisfied with those of the petitioner.)

TO THE UNITED STATES SUPREME COURT:

Respondent Roberto Lugo respectfully requests that this Court deny the petition for writ of certiorari which seeks review of the Fifth Circuit's opinion below. That opinion is an unpublished opinion but is reprinted in the petition for certiorari at Appendix A.

OPINIONS BELOW

(Respondent is not dissatisfied with that stated by the petitioner.)

STATEMENT OF JURISDICTION

(Respondent is not dissatisfied with that stated by the petitioner.)

CONSTITUTIONAL AND STATUTORY PROVISIONS

(Respondent is not dissatisfied with that stated by the petitioner.)

STATEMENT OF THE CASE

(Not needed.)

REASONS FOR DENYING THEWRIT

I.

THE FIFTH CIRCUIT'S OPINION IS SUBSTANTIVELY IN HARMONY WITH OTHER CIRCUITS.

Petitioners argue that the Fifth Circuit's decision "in effect abolishes the heightened pleading standard long recognized in federal civil rights cases" and is therefore "in direct conflict with every federal circuit court that has addressed the heightened pleading standard". In so arguing, petitioners obviously interpret the Fifth's Circuit holding in *Schultea v. Wood,* 47 F.3d 1427 (5th Cir. 1995) (en banc) as so holding.

Petitioners have misinterpreted *Schultea.* A closer reading of this case reveals that the Fifth Circuit has not abandoned a heightened pleading standard. As the Fifth Circuit stated, "we stand by our insistence that complaints plead more than conclusions". *Schultea,* 47 F.3d 1427 at 1430.

The Fifth Circuit did not abolish the heightened pleading standard but instead only affected the order in which the plaintiff must so plead. As the court stated, "we will no longer insist that plaintiff fully anticipate the defense (of qualified immunity) in his complaint". *Id.* However, the court continues, "a plaintiff can, at the pleading stage, be required to engage the affirmative defense of qualified immunity when invoked". *Id.*

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

ROLANDO GARCIA
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